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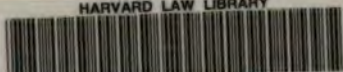
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CASES

DECIDED IN THE

Supreme Court of Ohio

UPON THE CIRCUIT

AND

AT THE SPECIAL SESSIONS IN COLUMBUS

DECEMBER, 1829 AND JANUARY 1831

REPORTED IN CONFORMITY WITH THE ACT OF ASSEMBLY

By CHARLES HAMMOND
ATTORNEY AT LAW

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CASES

DECIDED BY THE

Supreme Court of Ohio,

BEFORE ALL THE JUDGES,

AT A SPECIAL SESSION HOLDEN AT COLUMBUS, DEC., 1829.

LESSEE OF LUDLOW'S HEIRS v. CULBERTSON PARK.

When a case is reserved on the circuit, the facts material to its decision should be drawn up in writing, approved by the court, filed among the papers, and sent with them to the court in bank.

An order of court authorizing administrators to sell the real estate of their intestate, made subsequent to the sale, can not be given in evidence to sustain such sale.

Where, at the trial, evidence offered is rightly rejected, but an incorrect reason assigned for such rejection by the court, it is no ground for a new trial.

An order of court authorizing administrators to sell intestates' real estate, excepting that of a specified character, can not be given in evidence to sustain a sale of any of the lands excepted from its operation by its terms.

In a motion for a new trial, upon account of newly discovered evidence, the evidence must be disclosed, and the motion granted or refused, according as the court may suppose such evidence affects the justice of the case.

THIS was an ejectment, tried before the Supreme Court, in Hamilton county, in which a verdict was founded for the plaintiff, and a motion was made by the defendant for a new trial, which motion

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was adjourned here for decision. The case upon the trial appeared as follows :

The plaintiff proved that the lessors were the heirs at law of Israel Ludlow, who died in January, 1804, intestate. A deed from J. Cleve Symmes to Israel Ludlow, for the premises in dispute, was adduced in evidence, with proof of the possession and occupancy of Ludlow until the time of his death. The premises were a twenty-seven acre out-lot claimed to be within the plat of the city of Cincinnati. An official copy of the town plat was given in evidence, on which the premises were designated. It was also proven that the premises had been improved, by clearing, inclosing, and cultivation, in the lifetime of Ludlow. Upon these proofs, the cause was rested by the plaintiffs.

The defendant then offered in evidence a deed, from the administrators of Israel Ludlow, to himself, for the same premises. This deed bore date on December 21, 1810, and recited that the administrators had, on the 13th of that same month, sold the premises conveyed, under an order of the court of common pleas of Hamilton county, of December term, 1810. It was conceded that the [6] sale was, in fact, made on the day recited in the deed. A certified copy of the order of sale was produced, in the following words: "December 17, 1810. Petition of the administrators of Israel Ludlow, deceased, etc., for to sell real estate to satisfy the demands, etc., which this court grant." The plaintiff's counsel objected to the admission of this deed and order in evidence, on the ground that the order authorizing the sale, being made subsequent to the sale itself, and that fact appearing upon the face of the deed, the sale and conveyance were inoperative for defect of authority in the administrators to make a sale. The court sustained the objection, and rejected the deed and order.

The defendant's counsel then offered in evidence an order of the court of common pleas of Hamilton county, of May term, 1804, in the following words: "The administrators of the estate of Israel Ludlow, deceased, exhibit an account current, and pray the court to issue an order for the sale of the real property, to defray the debts due from the estate, etc. John Ludlow and James Findlay sworn in court. The court order so much of the real property sold as will meet the said demands, except the farm and improved lands near Cincinnati, together with the house and lots in Cincinnati." The plaintiff's counsel objected to this order being re-

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ceived in evidence, because the premises in question, being improved lands near Cincinnati, or a lot in Cincinnati, were not embraced by it; and also because the law in force when the order was made, was repealed in 1805, and no law substituted for it empowering the courts to order the sales of decedents' estates, until 1808. The order was also rejected by this court, and no evidence being given to the jury, divesting the title of the plaintiff's lessors, a verdict was rendered for the plaintiff, under the direction of the court.

The defendant's counsel moved for a new trial, and assigned the following reasons:

1. The verdict is against law.
2. The verdict is against evidence.
3. The court rejected legal and proper evidence, which ought to have been given to the jury.
4. The defendant has discovered new and material evidence since the trial.

*The newly discovered evidence consisted of an old copy of [7 the plat of the city of Cincinnati, in which the twenty-seven acre out-lots were not marked as a part of the town.

The questions arising on the motion for a new trial were adjourned for decision to the special session, at Columbus. At the time of adjourning the cause, no statement was made and approved by the court, presenting the state of the case, and the questions to be discussed and decided. When the counsel came to prepare their arguments, the counsel for the defendant alleged they had been directed by the court to argue only a single point, viz: "Whether any other order could be shown than that recited in the deed." This the plaintiff's counsel denied, and insisted that the whole case was open for discussion, as presented by the facts stated to have transpired at the trial. The cause was argued by N. WRIGHT, and CASWELL & STARR, upon this point, and by HAMMOND & GARRARD upon the whole case.

N. WRIGHT, in support of the motion for a new trial:

I shall contend that the recital of one order, in a deed of this sort, does not prevent the party from relying upon any other, which may sustain his title; that the material question is, whether the administrator had in fact the power to sell, and if the power existed, a misrecital of the power, or a neglect to refer to it alto-

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gether, will not vitiate the deed; but that the deed will be made to operate in any way in which it can be effectual, *ut res magis, valeat quam pereat*, according to the old maxim, "*quando non valet quod ago ut ago, valet quantum valere potest.*"

It will be kept in mind, that none of our statutes required the order or the proceedings to be recited in these deeds by administrators, differing in this respect from sheriff's deeds; the form of the deed, therefore, is left to common law principles.

The general principle is not questioned, that parol evidence is inadmissible to contradict or vary the effect of a written instrument; but the very language of this rule shows that it refers only to essential parts of the instrument; those parts where parol testimony would vary the effect of the instrument. An immaterial 8] part of an instrument may be varied or contradicted by parol; for the plain reason, that by so doing you produce no alteration in the operation of the writing. Thus the date may be contradicted, the amount of the consideration of a deed may be contradicted; if the deed recites incorrectly the prior chain of title, it is no impediment to showing the title truly; and almost all recitals may be contradicted; because recitals are not essential parts of the deed; as evidence, they are mere admissions of facts, and the truth may be generally shown. There are exceptions in relation to recitals, and the general principle is undoubted.

"A recital is not a necessary part of a deed either in law or equity. It may be made use of to explain a doubt of the intention and meaning of the parties, but it hath no effect or operation." Shep. Touch. 76, and n. 2; 2 Chan. Cas. 101.

"A recital is no estoppel, because not a direct affirmation." Co. Lit. 352, b; 9 Johns. 90.

Where the recital is essential to the operation of the deed, or where the terms are such that the grant operates only on the misrecited premises, there the recital can not be contradicted, and in such cases the general rule relative to parol evidence applies; but to an immaterial recital, it has no sort of application.

The only inquiry, therefore, in the present case, must be, whether the recital of the order is a material part of the deed. The deed is an execution of a power; and the order of court constitutes the power. It is an old and uniform common law doctrine, that a deed, made in execution of a power, need not recite the power, and that a misrecital does not vitiate it. It is so laid down in Oiler's

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case, and runs through all the books. 6 Co. 18; Cro. Eliz. 877; Cro. Ja. 31; 10 Co. 143.

Cruise states the law thus: "An instrument may operate as a revocation or appointment, without any mention or recital of power. For if the act done be of such a nature that it can have no operation, except by virtue of the power, the law will resort to the power, and thereby give validity to the instrument, upon the principle that *quando non valet quod ago ut ago, valeat quantum valere potest.*" T. Raym. 295; 4 Cruise, 240.

Powell says: "It is not necessary that the deed creating the power, should be recited or referred to in the instrument *ex- [9] ecuting the power, if the act done be of such a nature that it can have no operation unless by virtue of the power; for in such case the law will refer to that, and thereby give validity to the deed." Powell Pow. 111, 126.

And the rule is the same at law in ejectment.

Sugden Pow. 292, repeats the same doctrine.

Maddock says; "It is not necessary to recite, in order to execute, a power, if it clearly appears that the party intended to execute it," and "that all these doctrines (in relation to such conveyances), relate to what are considered as legal powers over legal estates, and as such, are within the adjudication of courts of common law, nor have courts of equity any original or exclusive power to decide upon them," etc. 1 Mad. Ch. 56, 450.

In *ex parte Caswall*, it is said, "Though a man may execute a power, without reciting or taking the least notice of it, yet he must mention the estate," etc. 1 Atk. 560.

In *Read's Lessee v. Reed*, in ejectment, the same principle is held. Lord Kenyon says, relative to a will, when no reference to the power was made, "Undoubtedly the words are sufficiently comprehensive to pass this fourth, if it can be collected from the will, that the deviser intended it to pass." 8 D. & East, 121; 6 East, 105; *Berkley's Lessee v. Archbishop of York*.

"If deeds can not operate in one form, they shall operate by that which by law will effectuate the intention." *Goodlittle & Edwards v. Baily*, 2 Cowp. 600.

Lord Redesdale says, "It is not necessary that the instrument, to operate under the power, should recite the power, or refer to it in any manner, in the execution of it; but if the act can have no

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effect but by virtue of the power, it is taken to be done in execution of the power." *Dillon v. Grace*, 2 Sch. & Lef. 404.

In *Maundrell v. Maundrell*, Lord Eldon says, "The authority of Sir Edward Cleer's case, as well as all general doctrine, seems to furnish this, that it is not necessary to recite that he means to execute the power, if the act is one that he can do only by that authority." This case arose on the construction and effect of legal conveyances. 10 Ves. 257.

So Chancellor Kent, "If the act can be good in no other way 10] than by virtue of the power, the act or will shall be deemed *an execution of the power, though there be no reference to the power." *Bradish v. Gibbs*, 3 Johns. Ch. 551.

So in *Jackson v. Pratt*, in ejectment, speaking of the misrecital of an execution in a sheriff's deed, he says, "Such recital was no necessary part of the deed, and a variance would not be material nor affect the validity of the deed, so long as there was existing a sufficient power to warrant the sale." 10 Johns. 386.

So in *Hatton v. Dew*, in North Carolina, it was decided that although the execution, under which the sheriff's sale was made, was erroneously recited in the sheriff's deed, yet the deed was good. 2 Murph. 260:

So in South Carolina, in *Harrison v. Maxwell*, the sheriff's deed recited the execution under which the sale was made, as issuing from the court of one district, when in fact it issued from another district; yet it was held the deed was good, notwithstanding this misrecital. 2 Nott & McCord, 347.

So in Tennessee, in *Craig v. Vance*, it was held that a misrecital of the judgment, by virtue of which the land was sold, does not vitiate the sheriff's deed. 1 Tenn. 209.

So in *Jackson v. Streeter*, it was held that a misrecital of the judgment in the sheriff's deed is not material, provided it be proved, in fact, that the sale was made under a subsisting judgment and execution. A recital is no material part of a deed. 5 Cowen, 529.

The foregoing references, and others which might be made, show clearly the general principle, that the recital of the power is not an essential part of the deed; and that the principle is applied to the case of sheriff's deeds, with reference to the execution which constitutes the power. The case of an administrator's deed is the same in principle, but in practice there is less reason for a refer-

ence to the power. The sheriff's authority depends on the writ, the issuing of which is a ministerial act; there is no direct judicial sanction upon it; and among the multiplicity of executions, there is great opportunity for errors. Not so with the administrator; his authority is the direct order of court, referring to the administrator by name, and pointing out distinctly the act to be performed. The order always remains to show the authority; the record itself, and not a writ ministerially issued, is the substance of the power. This single power is the *only one to which [11 the act can be referred; and a mistake in the reference can be attended with no evil consequences. If there should be successive orders, they are all before the same court, perfectly united in their object, to be accounted for all as one act, and resulting in the same charge and liability of the order. If, therefore, in the case of an execution, the recital is immaterial, surely it can not be material in the present case.

It is worthy of remark that some of our statutes expressly require the recital of an execution, thereby implying that without such statutory provision the recital would be unnecessary; but none of them require the recital of the order in an administrator's deed.

In the present case, the order is recited as of December term, 1810; the only thing proposed is, to show that the date of the term only is misrecited; the same court, the same parties and subject matter, the same object; indeed, in every respect the same, except the date of the term.

Even in the case of sale on execution under our present law, would it not be a construction somewhat literal and rigorous, to say the best, to hold that a mistake in the term, at which judgment was rendered, would vitiate the sheriff's deed?

The recital does not give validity to the deed, unless the authority be otherwise shown. The order must still be produced; the recital, therefore, is of no effect, unless it be requisite on common law principles as a rule of conveyancing. It is not evidence of the order itself, and of course can work no injustice in case of misrecital. It is a rule of all conveyances, that they shall be held to operate in whatever way they can; and judges are ever astute in devising a way to make them effectual, although it be one, which the parties never contemplated, or perhaps even knew. If the intention of the parties can be effected, it matters not what rules of

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law may be brought into its aid. It may happen that some legal nicety, unknown to the parties, may prevent the operation of the deed in the manner intended; and so, on the other hand, it may happen that some principle of law, equally unknown, may give it validity. And thus the law is at least as effectual in sustaining, as it is in defeating, the intention of the parties. The deed shall operate *quacunque via potest*; and no principle is more universal. 12] *Suppose the principle contended for on the other side should be followed up, and applied to all administrators' deeds, and sheriffs' deeds at those periods, when the statutes did not expressly require the recital of the execution. In how many instances will it be found that the deed has misstated the term at which the execution issued or the order was made? Judging from general principles, and the analogies to be found in the books, no one would have supposed such conveyances to be utterly void; they might rely upon them with ordinary discretion at least; and we may reasonably presume, therefore, that title is much involved in the question. It will not, then, at this late day, be lightly disturbed.

If we look into the books, on the subject of sales, under the direction of judicial tribunals, we shall find that every court has given the most liberal construction, for the purpose of sustaining them. It is not their aim to search for informalities or defects to defeat the end of the law; but rather to search for principles and analogies, on which to sustain such proceedings, in order that the objects of the law may be answered; that those who put their confidence in courts of justice, or in those on whom courts have conferred this power, may not be misled and deluded; and in relation to deeds and the private acts of parties merely, effect is always given according to the intention if possible, *ut res magis valeat quam pereat*. *Grant v. McLachlin*, 4 Johns. Ch. 37; 4 Robt. Adm. 3, 4; Cran. 3, 16, 27; 6 Wheat. 519; 20 Johns. 705; 4 Dall. 220; 1 Dall. 352; 6 Bin. 496.

GARRARD, for the plaintiff:

This case now comes up on a motion for a new trial, predicated on the supposed error of the court in rejecting the defendant's evidence. The whole case is before the court, and the plaintiff's counsel rely on each and all of the objections taken to the defendant's title.

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The first objection arises on the order of 1810. The deed and order taken together show that the sale was made prior to the granting of the order. No attempt was made to show that the recital of the time of sale was erroneous. It is true *the [13 court was asked to presume that there was a mistake either in the recital of the day of sale or the date of the order. But this they declined. The records of the court supported the date of the order, and the plaintiffs offered to prove the sale to have taken place on the 13th, as recited in the deed, but the court stated it was unnecessary, because the recitals of their own title papers must be taken and held to be true until the contrary was shown. The sale thus made before the order was granted was null and void, and the order of the 17th of December could not aid the title thus acquired. The administrators had no beneficial interest in the estate. They acted merely as the agents of the law to effectuate its provisions. The law did not authorize a sale previous to the granting of the order. Their acts were, therefore, nugatory to all intents and purposes. 3 Cowen, 299.

The first question that arose on the order of 1804 was, whether the defendant, under the circumstances of the case, could rely on that order. The plaintiff's counsel insist that he is precluded by the recitals of his own title papers. The deed from the administrators recites the fact that they acted under the order of December, 1810. They looked to and relied on that order as the power to sell the land to the defendant. The argument of the counsel for the defendant proceeds on the ground that there was a misrecital, which would not conclude the defendant, and all the authorities cited are cases of misrecital where there was a full and valid power to do that which had been done. But the facts of this case do not admit the application of a rule, the correctness and justice of which are not controverted. There is no misrecital in the case. In what does the misrecital consist? The deed of the administrators recites that the sale was made on December 13, 1810. The truth of this recital is not controverted; but is confirmed by the very fact that the defendant is driven to rely on the order of 1804 to sustain the sale. The deed recites that John C. Symmes executed to the administrators a deed of trust, to be executed under the order and direction of the court of common pleas of Hamilton county. The deed of trust is before the court and verifies the recital. The deed further recites that the court or com.

14] mon pleas, at December, 1810, granted *them an order to sell and carry into effect the objects of the trust reposed in them by the deed from Symmes. The records are in evidence, and the recital of the deed is supported by them. Where, then, is the misrecital? There is none. The records amply testify that the administrators acted exactly as they themselves recite that they acted. There is no collision between the recitals of the deed and the records of the court. The deed recites a state of facts which is at war with a fair administration of the law and the records show a proceeding entirely null and void.

To relieve the defendant of the dilemma, thus made clear by his own title, and the records on which it is founded, his counsel attempt to shift their ground and shelter him under the order of 1804. In making out title through administrators or executors under our statute, an order is an essential prerequisite to the validity of the deed. They act merely as trustees to execute the law. They have no beneficial interest in the estate which they may be authorized to sell under the law, and their deeds stand in this respect on the footing of sheriffs' deeds.

A sheriff's deed can not be given in evidence, without a transcript of the judgment and execution. They stand in the eye of the law as the basis of the title, and without them the deed is a mere nullity. In order to test the propriety of applying the doctrine of misrecitals to the case under consideration, a case may be supposed. Land is levied on and sold under a judgment of January term of the court of common pleas of Hamilton county, in favor of A. B. against C. D.; an execution is regularly issued, and the levy made and returned—the property advertised and sold—the deed recites all these facts—the purchaser pays his money and accepts his deed. Prior to the judgment, C. D. sells his land to a *bona fide* purchaser, and executes a deed to him. Could A. B., in an action of ejectment brought by such purchaser, say that there was a misrecital in his deed, and show a judgment of a term anterior to the alienation between the same parties, under which the land might have been levied on and sold? Certainly not. The judgment and order are emphatically the foundation of such titles, and the deed is the best evidence of what judgment or order the sheriff or administrator acted under in making the sale. And 15] when the records *furnish evidence of judgments or orders to correspond with the recitals of the deed, it precludes the idea

that other judgments or orders can be shown to support the deed, when those recited fail.

It is admitted that it was not necessary to recite the order, if the administrator was clothed with full power to sell, and that a misrecital of a valid power could not vitiate a deed otherwise properly executed within the power. 5 Cowen, 526; 10 Johns. 381; 3 Ch. Cas. 101; 9 Johns. 90. These were cases where the power referred to was a valid, subsisting power, and the misrecital was merely in the amount of the judgment or costs. Such mistakes the courts held to be immaterial, because there was a full, valid, and subsisting power, sufficiently identified by the recitals to sustain the sale and deed.

The defendant's counsel have referred the court to Comyn's Digest, title *Poair*, C. 4, and to title *Fait*, E. 1, both of which say it is unnecessary to recite the power in executing it; and that the misrecital of a valid power would not vitiate.

The cases referred to in Massachusetts reports seem to have no application to the case under consideration. The point settled in 3 Mass. 399, has never been controverted by the counsel for the plaintiff. So also in 10 Mass. 105, and 11 Mass. 227. To save time both to the counsel and the court, it is admitted to be the settled and incontrovertible law of the land, that purchasers, after a great lapse of time, will not be required to produce strict proof that administrators had taken the necessary oath, or that they had given regular notice of the time and place of sale, and especially when there is evidence that there was a sale at auction under a proper authority.

Such is also the law relative to tax sales of long standing, because it would be unreasonable, after a great lapse of time, to require of the purchaser strict proof of the regularity of tax bills, valuation warrants, notice of sale, etc.

The case in 11 Massachusetts decides what has been held to be the law of the State, time after time, by this court, and its correctness never questioned. If a court of competent jurisdiction grants an order to sell, the propriety of granting such order can never be questioned collaterally in an action of ejectment. In such [16] action the inquiry can not extend beyond the order. But these authorities have nothing to do with the point under consideration, and would not have been noticed, had they not been cited by the

defendant's counsel, and the court referred to them as illustrative of some point of the case.

None of the authorities cited would warrant the court in applying the doctrine of misrecitals to this case. There can be no propriety in permitting the defendant to set up a power in the administrators, which they did not claim in themselves, but which they in fact disclaimed, by obtaining the order of 1810, and reciting it as the authority under which they made the sale to the defendant.

2. Admitting that the recitals of the deed did not conclude the defendant, it is contended, in the second place, that the property in dispute was excepted from the operation of the order of May, 1804.

The order excepts and reserves the farm and improved lands near Cincinnati, together with the houses and lots in Cincinnati.

The lot in controversy, as was shown by the plat of the city, recorded in 1802, is one of three out-lots of twenty-seven acres as designated in the original plan of the city. The deed from J. C. Symmes to Ludlow for the lot includes it with other lots of the city. In the deed of the administrators to the defendant, it is described as the lot in the southwest corner of Cincinnati.

The construction given by the court to this reservation, in the case of *Ludlow's Heirs v. C. & J. Johnson*, 3 Ohio, 553, is decisive of this point. The terms of the reservation must be construed as if employed in a grant. A grant of all the lots in Cincinnati would unquestionably include all the lots presented on the face of the map of Cincinnati without regard to the quantity each might contain. It would be a matter of no consequence whether the lots contained one, or one hundred acres; if they were included in the plat of the city, and so made matter of record, they were properly and strictly speaking lots of Cincinnati, and within the fair and proper reading of the reservation. But if there should be, by possibility, a doubt raised on this point of the reservation, none [7] could exist on the other branch, which reserved *the improved lands near Cincinnati. There was full, clear, and uncontroverted proof to the jury, that a greater part of the lot had been under cultivation from 1793; and that at the time the order was granted the lot was in the possession of one Richardson, who had leased it of Ludlow in his lifetime, and occupied it for ordinary farming purposes. There was no effort made to contradict this testimony, because none could be made successfully.

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3. The order of 1804 was inoperative, because the act of 1795, "for the settlement of intestates' estates," on which it was founded, was repealed. This act, it will be contended, was repealed, *first*, by the act of February, 1805, "defining the duties of executors and administrators on wills and intestates' estates;" and *secondly*, that it was repealed by the act of February 22, 1805, repealing all the laws of the territory passed or adopted prior to September 1, 1799.

The burden of the inquiry, in the examination of this question, is to ascertain what was the intention of the legislature touching the subject; and in making this inquiry, a careful review of the early legislation of the state seems necessary. The legislature of 1804-5 undertook to revise and embody into one all the statutes of the territory and state then in force relative to each particular subject of legislation. They passed a new execution law, and incorporated into it all of the provisions of former laws which they wished to retain. They added new provisions, however, which serve to characterize what was then considered the true policy of the state relative to the sale of lands for the payment of debts.

Reason and justice require that these new provisions should be made alike applicable to the whole state and to each individual, unless there should appear something in the statute-book indicative of a different intention in the legislature. Such intention, however, does not appear, upon a fair reading of that statute, taken by itself or in connection with other acts of that session. Neither individually nor collectively do they admit of a construction that would work injustice or create invidious distinction. The protective character of the newly-incorporated provisions seems to have been demanded by the exigencies of the country. The state then *was*, and has remained agricultural in the main, and [18 the wisdom of successive legislatures has continued in force a system which looks to the protection of the soil (the basis of the wealth and prosperity of the state) from unwarranted sacrifice. No one can look to the legislation of Ohio without seeing that this subject has never been lost sight of since the earliest stages of the government; and, with the light of experience before them, no one will question the wisdom that introduced and sustained such a system.

The intention of the legislature to revise and reduce into one act the various acts relative to the subject of administrators, their

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powers, duties, and responsibilities, is clearly manifested in the act of February 1, 1805, "entitled an act defining the duties of executors and administrators on wills and intestates' estates." If, then, this leading object of the legislature is kept in view, there can be no difficulty in understanding what should be the construction of the act of February 1, 1805. The leading object of that act was the settlement of intestates' estates. It points out the powers and duties of administrators from the granting of the administration to the final settlement of his accounts; but in no part of the statute is it intimated that their powers should be extended to the real estate. The general jurisdiction and power of the court of common pleas could not reach the land through the agency of administrators.

If they possessed the power to order a sale, it was in virtue of some act of legislation. The act of 1795 was the only one which had ever conferred that power; and that act, coming within the spirit and letter of the repealing clause of the act of February 1, 1805, the power derived under it ceased with the law itself. That it was the intention of the legislature to define the whole duties and powers of administrators, and to limit them to the personal estate, can scarcely admit of a reasonable doubt. If such, then, was their intention, and the language of the statute will warrant no other conclusion, the repealing clause would stand a mere nullity if the act of 1795 should be considered unrepealed. The repealing clause repeals all laws on the same subject. The leading objects of both laws was the same—the settlement of intestates' estates. The act of 1795 pointed out the duties and powers of ad-
19] ministrators relative to the real *estate, when there was a deficit in the personal, for the payment of debts, etc. The act of 1805 stopped short of the act of 1795, and limited them to the personal estate, and to guard against their interference with the land of an intestate, they repealed all the laws on the same subject, leaving the act of 1805 as the only law for the future.

The intention of the enacting power can only be fairly drawn from the language they employ to express their intention. Had they intended, when enacting the law of 1805, to give the power to sell the real estate, it is somewhat strange that they should have used no language from which such intention could be reasonably deduced. While legislating so directly on the subject; while enacting a general revising and consolidating law, the very title of which

included the subject of the law of 1795, it seems to be a matter of impossibility that they should have intended such a power to exist for the future, and yet use no word or sentence indicative of such intention.

But aside from the repealing clause, I contend that the act of 1795 would have ceased after the passage of the act of 1805, and this, too, upon a principle that rests on a solid foundation of law as well as common sense. It is a well-settled rule of law that a subsequent statute, *revising* the *subject* matter of a former statute, and evidently intended as a substitute for it, although it contains no express words to that effect, must operate to repeal the former. *Bartlett v. King*, 12 Mass. 345.

I do not make this point merely for the purpose of swelling the number of points in the cause, but because I think it applicable to the case, and because it stands upon sound legal principles, and is supported by the best authority. Its application to this case will be made manifest by referring again to the act of 1805, taken in conjunction with the two other acts of that session bearing on the same subject. The one directing the manner of executing, proving, and recording wills and codicils, vol. iii., 173; the other directing the distribution of insolvent estates, vol. iii., 182. These three laws remained in force till June, 1808, when the subject matter of each was embodied into one law, and for the first time under the state government the power to sell lands by administrators was added. These three laws were then held *and regarded [20 as the only laws in force on the subject, and they are repealed by express reference to each. It can not be said that the legislature intended that the act of 1795 should stand in connection with these three laws as parts of an entire system, and that it remained in force with them till 1808, because at this same session they passed the general repealing law (which will be hereafter considered) that repealed the act of 1795. Upon the whole, therefore, I contend that the act of 1795 was repealed by the act of February 1, 1805, and that the order of May, 1804, ceased to have any operative effect after June 1, 1805.

In the second place, I contend that the act of 1795 was repealed by the general repealing law of February 22, 1805, vol. iii., 294. Section 1 of this act repeals all the laws adopted by the governor and judges prior to September 1, 1799. This court, in the case of *Ludlow's Heirs v. C. & J. Johnson*, 3 Ohio, 553, have decided that

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this law repealed the act of 1795, and that from this time to June 1, 1808, there was no law authorizing administrators to sell the land of an intestate.

This opinion of the court is decisive of the case under consideration, so far as it depends on the general repealing law, unless there is something in the saving clause to vary the case. By the saving clause it is provided "that nothing in this act contained shall be construed so as to effect, in any manner, any suit or prosecution now pending and undetermined; but the same shall be carried on to judgment and execution, agreeable to the provisions of any of the said laws, under which the suit or prosecution may have been commenced, and the practice of the courts."

Upon this cause the defendant's counsel rely to support the order of May, 1804, as a living, subsisting power, under and in virtue of which the deed to the defendant can be sustained. They contend that the order of 1804, when once granted, was properly a suit or prosecution within the meaning of the terms of the saving clause. In deciding this question we must again look for the intention of the legislature; and in conducting this inquiry, how shall their language be construed? Shall we apply to it the ordinary rules of interpretation? Shall we give to the words "suit and prosecution," which were to be carried on to final judgment and execution, their usual import when used in statutes; or shall their meaning be strained and molded to suit the circumstances of a desperate case? Does the case call for a deviation from the fixed and settled rules of construction? If it does not, the language of the clause furnishes a conclusive answer to the attempt that is made to extend its meaning to embrace the unexecuted and extinguished order of May, 1804. What are the facts? The administrators obtained an order to sell lands while the act of 1795 was in force. Under that order a part of the estate was sold. In 1805 the law was repealed. In 1808 the legislature passed a law authorizing administrators to sell lands under certain restrictions and on certain conditions. In 1810, while this law is in full force and recognized, and regarded as the rule of property, the administrators sold a part of the real estate. The heirs contest the validity of the sale, and allege that it was in direct violation of the laws of the land. How are they answered? Is it by showing that the sale was fair, *bona fide*, and consistent with the law under which it was made? No. They abandon the

order of 1810, and treat the act of 1810 as a mere nullity, and ask the court to enter into all their nice and hair-breadth distinctions, the end and drift of which are to defeat the plainest and most explicit declarations of the legislature. They ask the court to revive and continue in force, for their special benefit, a law which had been repealed five years and a half prior to the time of sale. And the language of the saving clause is the pretext under which they ask the court to sink the character of honest, enlightened, and independent expounders of the law, who alone look for the intention of the legislature, regardless of the consequences that may result from the malpractices of others, and assume that of a quibbling Jesuit, whose self-interest knows not the rights of others, nor regards the obligations even of a solemn oath.

The repeal is not to affect any "suit or prosecution then pending and undetermined." In using this language could it possibly have entered into the minds of the legislature, that at the end of twenty-five years it might be wrested to mean what the court are now asked to declare its true import? Could they have had in view to save such a case, and found no better language to express their intention? Such intention *can not be gathered from [22] the language employed without the most gross violation of the true import of the words taken separately, or in their connection. What is a suit? In the case of *Cohens v. Virginia*, the chief justice of the United States thus defines it: "We understand it to be the prosecution or pursuit of some claim, demand, or request. In law language, it is the prosecution of some demand in a court of justice. The remedy for every species of wrong, says Judge Blackstone, is, the being put in possession of that right, whereof the party injured is deprived. A suit is defined in the mirror to be the lawful demand of one's right, or as Bracton and Fleta have it, in the language of Justinian, "*jus prosequendi in judicio quod alicui debetur*." To commence suit is to demand something by the institution of process in a court of justice; and to prosecute a suit, is according to the common acceptation of language to continue that demand." Let this definition, thus drawn from the highest sources of jurisprudence, be applied to the language of the saving clause, and see how far the order of 1804 falls within it. If the order of 1804 was a suit, who were the parties? Who was plaintiff, claimant, complainant or demandant, and who the defendant? In some one of these characters a demand was made, if there was

a suit. But who appeared to make a demand? By what description of process was the demand commenced? Against whom was the demand made? How and in what manner was that demand pending, and for whose benefit was it prosecuting? It can not be said that the administrators were plaintiffs, because if in this transaction they are entitled to either character, it is properly that of defendant, of whom the creditors were making a demand.

It is manifest, however, that the language of the statute can not be made to embrace the order of 1804. Suits and prosecutions, in the proper legitimate signification of those terms, were what the legislature intended to save, and nothing else.

There are, however, other terms in the subsequent part of the clause, which are wholly inconsistent with the application of the term *suit* or *prosecution* to the order of 1804. It provides that the suit or prosecution shall be carried on to "final judgment and execution." If there was a suit pending and undetermined, within 23] the meaning of those terms, *may it not be asked, when was the judgment rendered thereon? What was the nature and extent of that judgment, and against whom was it rendered? If the judgment followed the nature of the action, how was it rendered? Was it in debt, case, assumpsit, or in some other form of action known to the law? The statute not only required them to be carried on to final judgment, but also to execution. Against whom was the execution issued in that case? What was the command of the execution? Did it direct the officer of the court, who rendered the judgment, to take goods, lands, or the body. This analysis of the language of the act exhibits in a strong light the gross and ridiculous absurdities that await the forced and unheard of construction the court are asked to give to the saving clause. The granting of the order is the only act done throughout the whole proceeding that can be assimilated to a judgment, and this was done more than a year prior to the repeal of the law. The court had no further judgment to give in the matter. The order, when granted, was the end of their jurisdiction under the law, so far as related to the creation of the power to sell. They could neither recall, alter, nor modify the power after it was granted. The moment that the order was made, the administrators had the power to proceed and sell. They looked to the law as their guide in the sale of the real estate, and upon that they had to rely as the authority to sell.

Many difficulties are removed by a correct understanding of the real source whence flows the authority to sell. I maintain that the law is the source of the power, and not the order. It is true that the order is an essential prerequisite to the exercise of the power. But the order itself looks back to the law for all the force and effect that it has in the sale of an intestates' estate. In granting the order of 1804, the court acted merely as the instrument of the law. It was confided to them to say in what cases, and when, a sale of the real estate was necessary. The order of the court was nothing more than a declaration that there was a necessity to sell the real estate, according to the provisions of the law of 1795.

This declaration having been made by the court, the administrators were authorized by the law to proceed and sell, not in virtue of any power given by the order, but in virtue of the [24 law under certain circumstances, of which the order was evidence. The order of 1804 stands on the records to this day, and is full evidence now of what it was then, that there was a deficiency of the personal estate, and a necessity for selling the real, as required by the provisions of the law of 1795; and if the argument for the defendant is correct, it is a full and valid power, under which the administrator could, at this day, proceed and sell the remainder of the estate, although the law of 1795 has been repealed upward of twenty years, upon which it was founded, and in virtue of which it alone had effect. The order taken "*per se*" stands as it has always done—complete evidence that there was a case made which authorized the court to grant it. But when taken in connection with the law under which it was granted and viewed as an authority to sell the lands, it remains on the records a dead letter since June, 1805. The law was the foundation whence flowed the authority to sell, and while the law remained in force, the administrators could, within a reasonable time, call that power into operation, as was decided by the Supreme Court of the United States, in the case of Ricard v. Williams. If, therefore, the language of the saving clause precludes the construction attempted to be given so contrary to all analogy, and the common use of language, no good and substantial reason can be shown why the court should do such violence to the manifest will of the legislature. No new or original proceeding could be commenced under any one of those laws embraced in the repealing act; and where no act had been done by the administrators toward a sale, where no third person had ac-

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quired rights under a due execution of the order, the effect of the law was to stop all matters where they were. It is manifest that the law did not contemplate the sale of real estate by administrators from June, 1805, till June, 1808. The law was so regarded throughout the state, with the exceptions of the sales made of Ludlow's estate in 1805. Those sales this court have decided to be void, and they add, "that it is manifest there was a time when this description of property could not be appropriated for this purpose through the agency of administrators."

But there is another view of the subject, which, to my mind, 25] presents an insuperable objection to the order of 1804, *as attempted to be used. Suppose that the authority to sell under that order did not cease with the act of 1795, upon which it was based, but survived the repeal of that law, the question then arises, how was this authority to be executed? I now put the question on the ground that the power to sell was still in full force and effect, either because the legislature did not intend to take it away, or because they could not. For the sake of illustration it may be placed on either or both. Was the power to be executed with reference to the provisions of the act of 1795, upon which it was founded, or the act of 1810, which was in force at the time of the sale?

If it was a living and valid power to sell the land, it was such in virtue of the act of 1795, because the act of 1810 prescribed a rule for future cases only, and did not contemplate the execution of powers already in existence. If, therefore, the power is sustained in virtue of the act of 1795, it seems to follow as a matter of consequence that it should be executed with a reference to the provisions of that law. So that the legitimate result of the whole doctrine is, that because the order was granted in 1804, when the act of 1795 was in force, it therefore clothed them with a power which not only survived the repeal of the law on which it was founded, but which they could execute regardless of subsequent legislation on the subject.

If the order of 1804 did survive the repeal of the act of 1795, and can be sustained to the extent contended for in this case, it must be upon the naked ground that the legislature had neither the power to repeal nor modify the law, so as to affect the order after it was granted; because there is nothing in the acts of the legislature of 1804-5, from which it can be reasonably inferred that they intended

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to give to the repealing laws of that session such an interpretation. The councils of the state would enact laws to but little purpose, if their power to repeal or modify existing laws should thus be circumscribed, or their acts be expounded in open hostility to their obvious intention. If the execution of the power is to be tested by the act of 1795, it then stands on the records of the court a perpetual and never-ending power; a power which alike disregards the repeal of the act of 1795, and the provisions of the act of 1810, which was demanded by the exigencies of the country. Such a construction *of the powers of the legislature, I apprehend, will not [26 be given by this court.

The execution of the power can not be sustained under the provisions of the act of 1810. This court, in the case of *Cowper and Parker v. Wills*, 1 Ohio, 124, declare that a title to land in Ohio, derived through the agency of executors or administrators, must be made out under the law; that the law is the instrument creating the power to sell, and the deed of the executor or administrator, the instrument executing that power, and that the validity of the latter will depend upon its compliance with the terms, conditions, and limitations of the former. Let this rule of law, which is founded on the soundest and most salutary principles, be taken as the test of the case under consideration. If the law be the instrument creating the power to sell in this case, what was it? The act of 1795 was the instrument creating the order of 1804, and under it the power should be executed if the rule was complied with in full. But suppose the law of 1810 to be the one under the provisions of which this sale is to be measured, have its terms and conditions been complied with by the administrators?

By section 31, it is provided in what cases and under what circumstances a sale of the real estate shall be made. Section 32 provides that when the court of common pleas shall be satisfied that a sale of the real estate is necessary, as provided in section 31, "That they shall appoint three disinterested men to view the lands, tenements, and hereditaments so to be sold, and return to the court a valuation thereof under oath; after which the court shall direct the executor or administrator to proceed to sell the whole or a part (as they may think proper) of such real estate, after giving notice of the time and place of sale by advertising the same in at least five public places in the county, or in some newspaper of the most general circulation in the county, for at least six weeks successively,

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and such lands, tenements and hereditaments shall be sold, provided that any such tracts of land, with the improvements thereon, do not sell for less than two-thirds, and any tract without improvements, for less than one-half of its appraised value." This section of the law bears materially on the question now under consideration. How does the sale comport with this section? Where is the evidence that one single requisite of this section has been complied with? I say of this section, because if they could show the proceedings of the court of common pleas in compliance with this section, the plaintiff would not be permitted to go behind the order to inquire whether the provisions of section 31 had been complied with. All the requisites of section 31 stand on the face of the order "*res adjudicata*." Those were matters confided to the discretion of the court, and when that discretion has been exercised by a grant of the order, they must be taken and held as matters adjudged.

But when the case is viewed with reference to section 32, it stands wholly unsupported in a single point. The records of the court of common pleas, so far from furnishing evidence that the requisitions of the statute had been complied with, prove directly the reverse. They show, incontrovertibly, a total disregard of the most essential and indispensable provisions of the statute. The very first step to be taken by the court, after they were satisfied that a sale was necessary, has been disregarded. Where is the evidence that appraisers were appointed? Who were they? When, and by whom were they sworn? When did they make their return to the court? What was the appraised value of the premises? The records of the court furnish no light by which a favorable answer can be given to any one of these questions. But their silence on this subject furnishes a strong answer against the defendant. Not only the letter, but the spirit of the statute required the intervention of appraisers. Their valuation was as indispensable, under the act of 1810, as the order itself. The order could not stand without it, because without it the grant of the order would be "*coram non judice*." The whole power of the court was derived from the statute. Their jurisdiction of the particular subject was not general, but limited. Any act, therefore, beyond the provisions of the law, would be null and void. *Tiernan v. Beam*, 2 Ohio, 383.

The appraisement was not only an indispensable prerequisite

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to the granting of the order, but when granted, was a part of the power, or rather a condition annexed to the power by the statute, which could not be disregarded in its execution. In this view of the subject, it does not stand, as has *been supposed, on the [28 footing of sales under execution. This court, in the case of *Allen v. Parish*, 3 Ohio, 135, decided that the appraisement was not a condition precedent attached to the authority of the sheriff to sell, but that the statute was merely directory.

If the sheriff neglected or refused to do his duty in this respect, the law attached a heavy penalty, and afforded to the defendant in the execution ample means to avoid injury. The defendant could on the return of the proceedings to the court, make his objections to their irregularity, and have them set aside; or he could pursue the remedy given by the statute in a summary way, for the malfeasance of the officer. This remedy was not only ample for the party injured, but was, in itself, a sure guaranty that the sheriff would do his duty under the provisions of the statute.

The substantial basis of this decision of the court is, that the defendant, in the execution, is a party to the whole proceeding, and that every reasonable opportunity is afforded him to protect his rights before the final consummation of the title by the payment of the money and the execution of the deed, and even after this he had his remedy under the statute, or he could pursue his action against the sheriff for malfeasance in office.

The reason of this decision can not apply to this case. What remedy had the heirs of Ludlow, under the act of 1810, for a neglect to appoint appraisers? Against whom did the remedy lie? Not against the administrators, because it was not their duty, and surely it would be a new doctrine that would turn them over to sue the court of common pleas for neglect of their official duty. They are not, however, without redress. Their remedy is the one which they are now pursuing. They look to their estate, and assert their right to recover and hold it against those who pretend to have acquired title, in violation, not only of the letter, but of the spirit and essence of the statute under which their title is said to be derived. The heirs were neither parties nor privies to the act of the administrators. They could not call on the court to have appraisers appointed. They were not before the court, nor did the law make any provision whereby they could be brought there, to direct or even assent to the proceedings of the court.

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29] They had no opportunity *afforded them to arrest the proceedings of the administrators, from the filing of their petition to the final consummation of the title. The court themselves had no right to review the sale and put their veto on it, even if it should have been conducted with a total disregard of the law. Admitting that an appraisement had been made and returned, if the counsel for the defendant are correct, the statute was merely directory to the administrators, and the sale would be sustained, although the land may not have been sold for one-tenth of its appraised value. But this position is untenable. It is at war with the policy of the law, and at once destroys all the checks and guards which the law had enacted to secure the rights of minors. The appraisement was a condition in the power to sell. The law could not authorize a sale on any other terms. It was an indispensable condition in the power, and beyond it the law would be no warrant for the sale. If the appraised value was bid, as required by the statute, a sale could be made, otherwise nothing could be done. The law was a good and sufficient authority for all their acts, while they were acting within its requisitions, but the moment that they went beyond the law their acts were null and void, and their deed conveyed nothing. *Tiernan v. Beam*, 2 Ohio, 383. The facilities afforded by the execution law for redress, where the sheriff neglects or refuses to do his duty, are not given in the case of administrators. Putting the case upon the ground that the heirs had recourse against the administrators, it was still in their power to reply that there was no appraisement made, and that it was not their duty to have one made and returned; that they had executed the power given them fairly and honestly, and that the land had sold for a good price. This reply might be made with great propriety and justice, and yet not one requisition of the act of 1810 be complied with. The fact that such a reply could be made, shows that the whole proceeding was "*coram non judice*," unless there was an appraisement, and if there was one, it constitutes a limitation and condition on the power to sell, which could not be disregarded in its execution.

But the defendant's counsel, ever fruitful of ingenuity when
30] pressed by the necessity of their cause, have an argument *at hand by which their case is extricated from difficulty, and they urge it on the court with their usual zeal.

They say that, at this distance of time, the court will presume

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all to have been correctly done which the law required, and to this point some of the authorities cited from Massachusetts reports are supposed to apply.

The principles settled by those authorities, as was before remarked, will be admitted to their fullest extent, but they bear not the most distant analogy to the case they are cited to support. It is insisted by the counsel for the defendant, that the court shall presume the appointment of appraisers. But upon what ground is this presumption to be made? So far from the record furnishing evidence upon which this presumption can be made, it presents a state of facts wholly inconsistent with it. It shows that the filing of the petition and the granting of the order was done at one and the same time. The court are asked to presume that the appraisers were sworn, but nothing is shown from which it can fairly be inferred. If they could show a valuation returned and filed agreeable to the statute, it would then be fair and reasonable to presume the administration of the oath. But the valuation is also to be supplied by presumption. Thus the court are asked to presume everything which was necessary to confer the power on the court of common pleas to make the order; because I contend that, under the act of 1810, the court had no power or authority to grant the order without a valuation made and returned; and that the records of the court should furnish evidence of the fact. The records are the best evidence that the nature of the case admits. What do they show? That a petition was filed on December 17, 1810, and that the order was granted at the same time. The whole record is in these words: "December 17, 1810. Petition of the administrators of Israel Ludlow, deceased, etc., for to sell real estate to satisfy the demands, etc., which this court grant." Upon this record the court are asked to say that it is fair and legitimate to presume that all the prerequisites of the statute to the granting the order were complied with. This application is attempted to be supported by the application of a class of cases, which, though they stand somewhat allied to it, do, nevertheless, rest upon an entirely different basis. The distinction which I take between those cases where an order, or decree, is conclusive, and where it is not, I think well founded in reason and supported by the current of authorities. It is a distinction which the court may adopt without violating any sound rule of law. It is this: That where a court in their character as such, and not

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depending on contingencies, have the power and authority to make the order or decree sought to be impeached, and where it was submitted to their sound discretion to grant or not to grant the prayer of the petition or bill, the order or decree is conclusive that the court had such facts before them as in the exercise of their discretion would warrant the order or decree. But where the power and authority of the court to make the order or decree is dependent upon the performance of certain acts, which it was not discretionary with them to do or not to do, as they might think proper, and of the performance of which the records should furnish evidence, the order or decree is neither "*prima facie*" nor conclusive evidence of the performance of such acts. The order, as it stands upon the records of the court of common pleas, would properly be taken and held as conclusive, that the court had such a case made before them by the administrators, as is required by section 31 of the act of 1810, and such as would have authorized them to have taken the proper and regular steps under section 32 to grant the order. But it furnishes no evidence that the provisions of that section were complied with, which necessarily preceded the final grant of the order. The records of the court should furnish evidence that the appraisers were appointed, that they were sworn, that they made a valuation, and that it was returned to the court prior to the granting of the order. But we are told, in reply, that the court will presume them to have been lost or mislaid. Where will the doctrine of presumption end? The appointment of the appraisers, the administration of the oath, and the appraisement, are first to be presumed. The record of these facts is then presumed into existence; and when we ask for the record, it is then presumed to be lost or destroyed, and thus by presumption they create and destroy, to suit the extremities of a desperate cause. Admitting the order should be considered proof conclusive that there was a strict compliance with the law, in all 32] that was done by the court, how is *the amount of the appraisement to be ascertained? In the execution of the order, when properly granted, the amount of the valuation was a matter of vital importance. This, too, is supplied by the omnipotent power of presumption, and the court are again asked to indulge this convenient principle, and presume that the sale was made for a proper proportion of the presumed amount of a presumed valuation.

Upon the whole, then, I consider the sale inoperative and void. The order of 1810 was subsequent to the sale, and the administrators having acted under that order were concluded from relying on the order of 1804. The premises in dispute, being a town lot, and improved, was excluded from the operation of the order of 1804, as decided in the case of the Johnsons. The order ceased with the repeal of the act of 1795, on June 1, 1805. The defendant's title can only be sustained under the order of 1804, in virtue of the act of 1795, upon the broad and unconditional admission that the order conferred a perpetual power on the administrators, which the legislature had not the authority either to alter or destroy. Such an admission, to even the smallest extent of time after the law of 1795 was repealed, can only be justified on one of two propositions; either that the creditors of Ludlow, by a tacit stipulation, made the remedial laws of the state a part of their contracts; or that by his death they, somehow or other, acquired a vested right to have their debts collected under the then existing remedial laws. Upon one or both of these propositions the conclusion must rest. They are both fallacious and untenable, as was most conclusively and triumphantly shown in the case of *Ogden v. Saunders*, Wheaton, by the chief justice of the United States. If either of these propositions had been viewed favorably by men of talents and reputation as sound and learned jurists, previous to the decision of that case, it is certain that since then they have been regarded as things that were, but that are now no more. They were then stripped of that plausible garb which ingenuity and sophistry had thrown around them, and their pretensions to sound legal principles forever silenced. The principles asserted, defended, and established by that opinion of the chief justice, are the same which this court had recognized and acted on in the case of *McCormick v. Alexander*, 2 Ohio, 65.

*The same propositions were argued before this court in the [33 case of the Johnsons, and were argued with no less zeal than ingenuity, by gentlemen of high legal reputation. The court then gave them, what they must ever do, their decided disapprobation, as sound or practical principles of law. But if, on the other hand, the sale is placed on the order of 1804, in virtue of the act of 1810, the defendant has failed to make a case. As it stands, upon their own showing, the whole proceeding was "*coram non judice*."

The case stated, and the single abstract question argued by the

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counsel for Park, is not the case that was presented, argued, and decided, at the last term of the Supreme Court, and by them reserved on this motion. The court never were called on to decide the abstract question of law, whether the recital of the deed concluded the defendant from showing and relying on any other order. No such question arose. None such was argued by us, and none such was decided by the court. When the defendant offered the order of 1804, we did make that question with the others as stated in this argument. They were all argued at one and the same time—they were not presented to the court separately, nor was their opinion given on them separately. The question whether the premises was a town lot or improved land within the meaning of the reservation, was argued at length, and upon both these points the court gave a decided opinion in favor of the plaintiff in the ejectment. To show that it was a town lot, the book from the recorder's office, containing the original plat of the town, was introduced, and was laying on the table before the court when they gave their opinion.

N. WRIGHT, in reply:

It is argued with much earnestness, that the question argued by defendants is a mere abstract proposition. In my view of the case, this position is unfounded. There is a wide difference between the effect of an item of evidence, when received, and the competency of that item. It may be of itself entirely insufficient to sustain the title of the party, and still be competent evidence as an item for that purpose. Had this case been submitted to the 34] court on the *whole evidence of both parties, the court would be called on to decide on the effect and sufficiency of the whole; or if the case had been presented to the jury fully by both parties and directions given to find a verdict for one, with leave to the other to move for a new trial on the whole case, the effect and sufficiency would be called in question. But such is not the case, as I understand it. The motion for a new trial, so far as this matter is called in question, is made because an item of evidence is overruled; the decision complained of was, that the evidence was incompetent. The order of 1804 (perhaps others, it is immaterial), was offered and overruled as being incompetent; now if the recital of another order precluded us from showing that of 1804, the latter was clearly incompetent; but if it did not so preclude us, it was

not incompetent, however insufficient it might be of itself to sustain our title. It is argued that the land in dispute is within the exception contained in that order; but whether within the exception or not, is matter of fact for the jury to decide, and on that ground it certainly was not incompetent. If the jury should find it to be within the exception, it would of course be insufficient to sustain our title; but before they can so find, the order must be before them.

It is also argued that the law under which this order was made, had been repealed, and thereby the order was canceled. Suppose we admit for a moment this extraordinary doctrine; does it follow of course that this order was incompetent as an item of evidence? No testimony can be said to be immaterial, which, upon any supposable state of facts, applicable to the case, could legally influence the finding of the jury. Can it be said that the order of 1804 although of itself insufficient to sustain our title, could not be connected with any other evidence, so as to become material? That no subsequent acts of the court, referring to, predicated upon, or recognizing that order, could exist, so as to render that order material in the case? Here we are met with the opposite statements that such orders were not proved. Perhaps not, and they could not be, nor even offered under the decision of the court, the order being decided incompetent on the ground of the recital. The opposite counsel have brought this difficulty on themselves by the course they have chosen to pursue. Instead of putting the [35] case into a shape to present the whole testimony on a motion for a new trial, they have chosen to object to an item of evidence; the item is overruled as incompetent because of the recital; they now attempt to sustain themselves by showing that it was immaterial. Does not every lawyer know, that the materiality of evidence is a very different thing from its incompetency on other grounds; that to judge of the materiality, reference must be had to the whole facts of the case; and, therefore, where the incompetency is established in such a way as to shut out some of the facts, that the materiality can not be fairly judged of. If a witness be called, and the testimony he is to give be stated, and he is then excluded on the score of interest, on which the party is obliged to abandon his case, would the party be allowed, on a motion for a new trial, on the ground that this witness was excluded, to abandon the question of interest, and argue that the testimony offered by him was immaterial? or would the court tell him, we have prevented the

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party from developing his case, and we must know more of it, before we can say whether or not the testimony is immaterial.

In the case before the court, it is perfectly plain, that the decision on the trial must produce the same effect. The order is objected to, and is overruled, because it is not recited in the deed. In that view of it, the court can not look into other evidence to show its materiality, the counsel can not offer evidence for that purpose, for such becomes perfectly immaterial under the decision. This has no resemblance to the case as suggested by the other side, of a wrong reason given for a right decision; for it is not the reason given, but the facts on which the decision is to be predicated, that are different.

The mere fact that this order was excluded on the ground of the misrecital, precludes the possibility of the facts being so presented as to enable the court to judge of the materiality. We are told, on the other side, that great injustice will be done, by confining the case to this point; that if they can sustain the verdict upon any grounds whatever, it must be done to end the litigation. Mark what these plaintiffs call justice! On the trial a decision is made upon one point, which operates to exclude all our evidence; and, 36] therefore, *though that point was wrongly decided, we must still be condemned on the evidence as given, without the opportunity of having the benefit of what might be given under the corrected decision; because by an error of the court we have but half made out our case, therefore we must be tried upon that half. This all inevitably results from the single fact, that the order was excluded upon the mere ground in question; that is, it was overruled on a ground which did not admit an examination into the other facts; it was simply rejected as incompetent, the course selected by the opposite counsel was not one to bring the whole facts before the court on this motion; and however much they may have been talked about by counsel on the trial or in argument, they are not before them on a fair view of the case.

Such was my view of this point, and some of the considerations, which I supposed influenced his honor to restrict our argument to the single point. If I am mistaken in the law, and have misapprehended the judge, so it must be. But these cases seem to me to be hard enough on the defendants, in justice and good conscience, without their being deprived of the fullest and fairest trial. When I discovered the misunderstanding, it was too late to do any sort

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of justice to the question on the effect of the repealing law upon this order; a question involving so much property, and on which other suits are pending in the courts, could not in justice be argued without more investigation. And there is quite as much reason to say, that there is an attempt here to obtain a premature and incidental decision of that important question, as for several remarks that have been made.

In relation to the exception contained in the order, I do not and have not considered that a very material matter. It is really a question of fact, and if decided against us on the trial, it is clearly shown that we ought to have a new trial for the evidence since discovered.

It is attempted to make a distinction in relation to the recital of an order, between this case and the case cited; that these are merely some mistake in the description, and this a case where one order is acted upon, and another offered in evidence.

In answer to this, in the first place, it is purely a matter of fact under which order the sale was made. No orders were *in [37 fact issued; the administrators acted by virtue of the entries on the minutes of the court, to which no additional validity could have been given by procuring the clerk to make a certified copy. It was therefore a matter which we claim a right to prove, that we actually sold under the old order; but the effect of the decision of the court was to preclude us from such evidence; they decided that the order itself could not be shown, because not recited; of course they excluded all evidence of a sale in fact made under that order. I trust the gentleman will not insist that this case was taken from the jury by the court on a question of fact, whether or not the sale was really made under the order of 1804.

But again, concede the administrators really supposed they were acting under the order of 1810. This would not help the plaintiffs. In this particular these orders have no resemblance to executions. An execution confers particular power to do particular acts, under a particular judgment. Even then, if the sheriff should hold two executions, and should sell on executions generally, without declaring which, and should recite one in his deed, which did not cover the property, it would not estop him from showing the other. A case much more analagous is this: I hold two powers of attorney, and execute a deed reciting that power, which does not cover the land; does it estop me from proving the other power,

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which does cover it? If the cases be examined, they will be found to go thus far; if a man has several powers, or several modes of making a conveyance, etc., and adopt one, and recite one, and suppose he is acting under one, which finally proves ineffectual, the law will resort to the other, without any regard to his intention, and make the act effectual.

[In consequence of the great length of the arguments of Messrs. WRIGHT and GARRARD, those of Mr. HAMMOND, and of Messrs. CASWELL and STARR, are omitted.]

Opinion of the court, by Judge HITCHCOCK:

The practice of the court requires that, when a cause is reserved for decision at the special session, a statement shall be made in 38] writing, and filed with the papers in the cause, *showing the particular point or points to be litigated and determined. If the question reserved, arises upon the sufficiency of the pleading, such statement is unnecessary. Nor is it required in chancery proceedings, where the evidence is in writing, and with the pleading submitted to the court. But where the court is supposed to have erred in the admission or rejection of evidence in the course of a jury trial, which supposed error is made the foundation of a motion for a new trial; or where the court, in the course of such trial, reserves questions for subsequent consideration, such statement is peculiarly necessary. Without it, it may many times be difficult to arrive at a satisfactory conclusion. The statement should be drawn up by the counsel excepting to the opinion of the court, submitted to and approved by the court, and filed away by the clerk. This having been done, no room is left for subsequent altercation. The propriety and necessity of this course of practice is clearly evinced in the present case. No statement in writing was made, consequently the counsel differ as to the precise question reserved. Contrary statements are exhibited with a view to satisfy the court as to this point. From our knowledge of the gentlemen concerned, we have not the least doubt but that they state the circumstances as they understood them when these circumstances transpired, but it is manifest there must have been some misapprehension.

The case now comes before the court on motion for a new trial. The motion is grounded upon a supposed error in the court upon the circuit, in the rejection of certain evidence offered by the de-

fendant; and upon the fact that the defendant, since the trial, has discovered evidence material to the issue. Other reasons are assigned in the record, but they do not appear to be relied upon, not being even referred to in argument.

On the trial of the cause to the jury, the defendant offered in evidence a deed to himself, from the administrators of Israel Ludlow, purporting to convey the premises in controversy. The deed bears date December 21, 1810, and recites the fact that the sale was made on the 13th day of the same month. At the same time the order of sale of December 17, 1810, was offered in evidence to show the power of the administrators to sell. *The re- [39] cital of the deed states that the sale was made in pursuance of this order. The evidence thus offered was objected to by the counsel for the plaintiff, the objection sustained, and the evidence overruled. In rejecting this evidence the court decided correctly, unless the doctrine can be maintained that an order of the court of common pleas, authorizing an administrator to sell the real estate of his intestate, will have so far a retrospective operation as to legalize a sale made prior in point of time to the order itself. An attempt will hardly be made to sustain a principle so absurd. In fact, I do not understand that there is any complaint in consequence of the rejection by the court of this order.

The defendant next offered in evidence the order made by the court of common pleas, at the May term, 1804. This evidence was objected to for a variety of reasons. It was urged that inasmuch as it appeared from the recital in the deed, that the administrators, in making the sale, and the defendant in purchasing, looked to the order of 1810, he should be concluded by it, and could not show any other order conferring authority upon the administrators to sell. It was further urged that the order of May, 1804, did not embrace the premises in dispute, and if it did, then that that order ceased to operate from and after the repeal of the law of 1795, "for the settlement of intestates' estates." The court sustained the objection, and overruled the evidence. In deciding the question, an opinion was expressed that the defendant, by the recital in his deed, must be precluded from giving in evidence any other order than that of December, 1810.

Counsel for the defendant contend, that the case was reserved, not so much for the purpose of determining whether this evidence was properly rejected, as for the purpose of determining whether

the opinion thus expressed is consistent with law ; and insist that if it is not, a new trial should be granted. On the other hand, it is insisted for the plaintiff, that the whole case is before the court, and if, for either cause assigned, the evidence ought to have been rejected, then that the motion for a new trial should be overruled. From the recollection of the judge who presided at the trial, as well as from the nature of the case, we are induced to believe that the counsel for the defendant must have misunderstood the court. 40] In the trial of a cause, a particular *item of evidence is offered, and objected to for a variety of reasons, one or more of which are sufficient to show that the evidence is improper. The court, in assigning reasons for the rejection of the testimony, express an opinion upon some one point, which can not be sustained upon legal principles. It is unreasonable, it is contrary to every day's experience to suppose that, upon a motion for a new trial, the court will confine themselves to the consideration of the opinion thus expressed. The only proper inquiry in such case is, was the evidence properly rejected, and that without regard to the particular reasons assigned by the court when it was rejected. Any other course would lead to manifest injustice. It would be trifling with the rights of the parties.

We come now to the consideration of the question, whether the court mistook the law in refusing to admit the order of May, 1804, in evidence. That order is in these words: "The administrators of the estate of Israel Ludlow, deceased, exhibit an account current, and pray the court to issue an order for the sale of the real property to defray the debts due from the estate, etc. John Ludlow and James Findlay sworn in court. The court order so much of the real property sold as will meet the said demands, except the farm and improved lands near Cincinnati, together with the house and lots in Cincinnati." In offering this evidence, the defendant could have no other object in view, than to sustain his title, by showing an authority in the administrators to make sale of the premises in dispute. The administrators might have had authority to sell all the real property of the intestate, with the exception of this identical land, and it could avail them nothing. The object to be effected by the sale is expressed in the order. It was to enable the administrators to pay the debts due from the estate. It is true the amount of those debts is not stated, yet the order is general to sell "so much of the real property" as will

"meet the said demands." No specific property is referred to as that which shall be sold, but all the real property, "except the farm and improved lands near Cincinnati, together with the house and lots in Cincinnati," are in effect subjected to sale. It would seem that there could be no difference of opinion with respect to the construction to be put upon this order; that there could be no doubt with respect to the property to be *sold, or with [4] respect to that exempted from sale. It is of the same import it would have been, if couched in these words: "The court order so much of the real property sold as will meet the said demands; provided, the administrators shall not be permitted to sell the farm and improved lands near Cincinnati, nor the house and lots in Cincinnati." The "farm and improved lands," as well as the "house and lots," are exempted from sale. Such is the manifest intention, and such the construction which would be put upon it by any individual examining the order itself, without being influenced by any controversy connected with it. Ingenuity of counsel may possibly enable them to give it some other construction; but the court must collect the intention of the tribunal from which it emanated, by giving to the words and terms used their usual and appropriate signification. Will it be said it was the intention of the court to authorize the sale of "the house and lots," or of all the "improved lands" except the farm, or of such "lots" as were not improved? Before I can be satisfied of this, I must be satisfied that the court did not understand the meaning of language. The "house and lots," the "improved lands," the "lots" whether improved or not improved, are real property. The administrators are authorized to sell the whole real property, exclusive of that saved by the exception, and after having given this general authority, it is not to be credited that the court would proceed to specify "the house and lots," etc. But for the exception, these would have been condemned to sale; by it they are exempted.

The same construction was put upon this order in the case of the Heirs of Israel Ludlow v. C. and J. Johnston, 3 Ohio, 578. That case was repeatedly argued, having been before the court for years. Every point necessary to decide the case was fully considered, and after much deliberation determined; and the decision upon each point fully concurred in by all the members of the court present when the case was finally disposed of. It may not

be improper to say further that the court as at present composed are fully satisfied with the decision of that case. Such being the fact, we shall do nothing to disturb in any one particular the principles there settled.

42] *This construction being put upon the order of May, 1804, it is necessary to consider whether that order would be competent evidence to prove, or as conducing to prove, an authority in the administrators to sell a lot or "lots in," or "the farm and improved lands near Cincinnati." It is argued that although the order might have been insufficient to sustain the defendant's title, still it was competent evidence. Why? Because it is said there might by possibility have been some other evidence offered to show its relevancy. Such other evidence was not offered, and not having been offered, we are not to presume its existence; the legitimate presumption is, that it does not exist. At any rate, the court must decide upon what was, not upon what might have been offered. Testimony irrelevant to the matter in issue is incompetent. Proof of power to sell one tract of land, no more conduces to prove a power to sell another than proof of the sale of one tract conduces to prove the sale of another. The court from which the order in question emanated, could not confer a greater authority upon the administrators of Ludlow, to dispose of his real estate, than what Ludlow himself might have conferred, in his lifetime, upon an agent, by letter of attorney. No one will contend that an authority given to an agent to sell one tract of land authorizes him to sell another. Suppose Israel Ludlow in his lifetime, owning lands in the counties of Warren and Hamilton, had made an attorney authorizing him to sell his lands in Hamilton. The attorney, in virtue of this order, would most assuredly have no right to interfere with the lands in Warren. But suppose he had sold lands in Warren, and controversy should now arise between the heirs of Ludlow and the purchaser. Will it be said that the power of attorney authorizing the sale of the Hamilton lands would be competent evidence to prove, or as conducing to prove, an authority to sell the lands in Warren, and consequently to sustain the title of the purchaser? To my mind it is most clear it would not. So far as respects the Warren lands, the power of attorney would be a dead letter. It would be the same as if no such power had ever been made. It would have no relevancy to the matter in controversy, of course would be incompetent evidence.

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I should as soon as think, upon a question respecting the title to land in Hamilton county, of receiving in evidence a deed conveying *land in a different county, there being in no shape or [43 manner any allusion, in the deed offered, to the land in controversy.

The same principle must apply to the order of May, 1804. In virtue of that order, the administrators of Ludlow claimed the authority to sell, and did sell, certain lands. In that order no allusion is made to "the farm and improved lands near Cincinnati," nor to the "lots in Cincinnati," any further than to exempt them from sale. And it would be strange that this order should be received in evidence to prove an authority to do an act which it expressly provided should not be done. If, then, the premises in controversy are within the exception contained in the order, as construed by the court, the evidence was properly overruled, being irrelevant to the matter in dispute.

Whether the premises are within the exception remains to be considered. And here it may not be improper to remark that in determining whether the court erred in rejecting the evidence, we must take the case as then presented, without reference to the evidence said to have been newly discovered. Most, if not all the towns which have been laid out in this state, have been surveyed into in and out-lots, both, however, being considered as constituting parts of the town. On December 6, 1800, the general assembly of the territory passed a law "providing for recording town plats," requiring, among other things, that the map or plat to be recorded, should "set forth and describe" the lots intended for sale by their progressive numbers, etc. In practicing under this law, it has ever been the custom to "set forth and describe" both in and out-lots upon the recorded plat. In pursuance of the provisions of this law, the town plat of Cincinnati was recorded. At an early period, town property was withdrawn from taxation for state purposes, and subjected to taxation for county purposes. In levying the county tax, both in and out-lots were by statute made liable. All these circumstances go to show that, by our policy, out as well as in-lots have been, and are to be, considered as lots in town. An authority to sell lots in town would authorize the sale of either kind. An exemption of lots in town from sale would exempt either kind. When this cause was in trial to the jury, the recorded plat of Cincinnati was before the court. Upon that plat

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44] the premises in controversy are *"set down and described" as an out-lot in the town. In truth it did not appear to be controverted that such was the fact. It was so considered by the court, and correctly, according to the evidence then before them. The premises then being a lot "in" Cincinnati, and within the exception of the order of May, 1804, that order did not authorize the administrators of Ludlow to make sale of this land; on the contrary, it, in effect, prohibited such sale. It is irrelevant to the matter in controversy between these parties, consequently incompetent evidence, and was properly rejected by the court.

Whether the opinion incidentally expressed by the court, as to the effect of the recital in the defendant's deed, was or was not correct, we do not undertake to determine. It is unnecessary inasmuch, as for the reasons already assigned, the evidence was properly rejected. Nor shall we express an opinion as to the effect of the repeal of the law of 1795, upon the order of 1804. This presents an important question, and as we are informed that much property depends upon its determination, we are the more anxious to hear every argument which can be urged, before it shall finally be decided.

I now come to the consideration of the motion as founded upon the discovery of new and material evidence. Motions for new trials are addressed to the discretion of the court, and unless founded upon some supposed error of the court, will be granted or refused, as the justice of the case may seem to require. A jury may decide against strict law, or against the weight of evidence, and still substantial justice may have been done. Under such circumstances a court would be unwilling to disturb their verdict. When the motion is grounded upon the discovery of new and material evidence, our practice requires that newly discovered evidence should be disclosed. This is required that the court may be enabled to form an opinion, whether, by the introduction of such evidence, a different verdict ought to be obtained. In considering the motion, the court will not inquire, whether, taking the newly discovered evidence in connection with that exhibited on the trial, a jury might be induced to give a different verdict, but whether the legitimate effect of such evidence would be to require a different verdict. In the 45] trial of issues in fact, the court judge of *the competency, the jury of the credibility and effect of testimony. But after verdict, when the motion for a new trial is considered, the court must judge

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not only of the competency, but of the effect of evidence. If, with the newly discovered evidence before them, a jury ought to have come to the same conclusion they have done, it would be worse than useless to grant a new trial. The effect would be to add to the expense of the litigation, and delay parties in obtaining their rights. On the trial of this cause, the evidence showed the premises in controversy to be a "lot in Cincinnati." The design in introducing the new evidence is to prove that such is not the fact. But would the legitimate effect of this evidence be to require a different verdict? The premises, if not "in," are certainly near Cincinnati. On the trial they were proved to have been improved prior to the date of the order of May, 1804. By the terms of that order, "improved lands near," as well as "lots in" Cincinnati, are exempted from sale. The introduction of the newly discovered evidence, therefore, taken in connection with that exhibited on the trial, could not avail to sustain the defendant's title. There would be the same want of evidence to show an authority in the administrators to make sale of the premises. It would be useless, therefore, to have a new trial.

The motion is overruled, and judgment must be entered on the verdict.

J. FOWBLE v. WM. RAYBERG AND WM. W. TAYLOR.

Previous to the act of February, 1824, where a sheriff in office had levied a *fin. fa.* upon land, a *vendi.* might issue to the same person after his office expired, and a sale made by him would be valid.

A return, made on a *venda.* by the late sheriff, to December, 1810, that he had sold certain lands previously levied on, was, in December term, 1812, the sheriff making the return being deceased, on motion of his representatives, ordered to be so amended as to state that the property remained on hand for want of bidders. At February term, 1828, this order of amendment was rescinded, on motion of the purchaser at the first sale, and an order made that the sheriff make a deed. Proceeding held regular.

When a sale of land has been made by a former sheriff, the deed is to be made by the sheriff in office at the time of the application.

CERTIORARI to the court of common pleas in Hamilton county.

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On September 5, 1810, an *alias* or *pluries venditioni exponas* issued from the court of common pleas of Hamilton county, directed to Aaron Goforth, late sheriff of Hamilton county, at the suit of Rayberg and Taylor v. Fowble, returnable to the December term, 1810, 46] of said court of common pleas. The *vendi.* was returned *with the following indorsement: "Received this execution September 5, 1810. On December 8, 1810, I sold the within-described land to Christopher Walker, and have made the money. Aaron Goforth, late sheriff."

On March 1, 1828, during the February term, Fowble, by his counsel, moved the court of common pleas to set aside this execution, and all subsequent proceedings thereon. Upon the hearing of this motion, the following facts were proven or admitted, as appears from a bill of exceptions annexed to and made part of the record. It was proved that on September 21, 1808, Rayberg and Taylor recovered a judgment in the Supreme Court against Fowble, for one thousand one hundred and fifty-five dollars and fifty-three cents damages, eight dollars and seventy-one cents costs, in the court of common pleas, and eleven dollars and twenty-nine cents costs in the Supreme Court, which judgment was certified to the court of common pleas for execution. It was further proven, that prior to September 5, 1810, several executions had issued upon this judgment directed to Goforth while sheriff of Hamilton county. That, on September 21, 1808, a writ of *fi. fa.* was issued, thus directed and returnable to the December term of that year. This writ was returned with the following indorsement made by the sheriff: "I have levied upon one hundred and six and one-third acres of land in the northeast corner of section 25, of township 3, and fractional range 2; also, ninety-four and three-fourths acres in section 25, township 3, and fractional range 2, which remains unsold." This land was subsequently sold under the *vendi.* of September 5, 1810. It was further proved, that on May 1, 1809, a *vendi.* was issued, upon which the sheriff made the following return: "I have held inquiry, and property of the annual rent of four hundred and fifty-four dollars and sixty-two and two-third cents, and of the value of four thousand four hundred and twenty-six dollars and sixty-two and two-third cents, as appraised by inquisition hereunto annexed." It was admitted that Goforth went out of office on April 7, 1809, and had not been sheriff since; and it was proved that on December 8, 1810, he was a member of the senate of the state, soon after

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which he died. Previous to his death, no deed was made to Walker conveying the property sold. It was further proved, that at the December term, 1812, of the court of common pleas, on the application of William Corry, one of the administrators of the late sheriff Goforth, it was ordered that the return made on *December 8, [47 1810, to the *vendi.* of September 5th, be amended, and that the return should be "property on hand for want of bidders." In pursuance of this order, the following amended return was caused, on May 8, 1813, to be entered on the same execution: "By virtue of an order of the court of common pleas for December term, 1812, on hearing the representatives of the late sheriff, to amend the said return by returning property on hand for want of bidders, the same is hereby amended accordingly." Subsequent to the amended return, another *vendi.* issued, returnable to the August term, 1813, but on this execution no return had been made. It was further proved, that on February 26, 1828, the amended return so made by William Corry, was, on motion of Christopher Walker, ordered by the court of common pleas to be set aside, vacated, and held for naught, the return originally made by the late sheriff reinstated, and that a deed be made to Walker for the land, agreeable to the return made by Goforth on December 8, 1810, it being proven that the purchase money had been paid but no deed made. It was also proved that previous to the act of 1824, "defining the duties of sheriffs, etc., in certain cases," it had been the invariable practice of the court of common pleas in Hamilton county to direct executions to the person, as late sheriff, who had been sheriff, and who had commenced proceedings by levy, etc., but had not finished before the term of office expired. The court of common pleas, after a full hearing, refused to set aside the execution, and overruled the motion of Fowble.

The case now comes before this court upon a supposed error of the court of common pleas in overruling this motion. The errors assigned are in substance:

That the execution was improperly directed, being directed to the late sheriff, whereas it should have been directed to the present sheriff.

That the amended return was improperly set aside and vacated.

That the deed was improperly ordered, after the intervention of so great a length of time after the sale, to wit: fifteen years.

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48] *CASWELL & STARR, for plaintiff:

The first question presented is, was the *vendi. exponas* of September 5, 1810, rightly directed to Goforth after he had gone out of office, and when he was a judge of the very court from which it issued, and could he sell and make a title to the purchaser.

In the first place there was no necessity for the proceeding. It should have been directed to the then sheriff. He was in all respects competent to act under it, and perform its exigency. The possession of the property had not been changed by the levy made by Goforth, as it sometimes is in the case of personal property.

It is admitted that when a sheriff goes out of office, having an execution in his hands, he may finish it, or his deputy may do it for him. For that purpose he was still sheriff, and such is the decision in the case of *Jackson v. Collins*, 7 Cowen, 95. The court say that as to an execution in the sheriff's hands when he goes out of office, he continues sheriff and may act by deputy, though the office of the latter must be considered as expiring with that of the principal. 20 Johns. 64.

If a sheriff had taken goods on execution and returned them on hand for want of buyers and goes out of office, and to complete the sale it be necessary that a *vendi. exponas* issue, it should be directed to the new sheriff. 4 Com. Dig. 237, title Execution. The old sheriff may sell without execution, especially if he have the goods in his possession; but if he neglect to do so, the mode of compelling him is not to issue a *venditioni exponas* directed to him, but a writ of *distringas* directed to the new sheriff, commanding him to distrain on the old sheriff till he sell the goods and pay over the money to the present sheriff; or till he sell the goods and bring the money into court himself. The latter is said to be the most usual mode of proceeding. Biorgh on Executions, 262, 263; Tidd's Prac. 1060; 6 Bac. Abr. 161, title Sheriff; Ld. Raym. 1075; 1 Sal. 233; 2 Dun. N. Y. Practice, 323; 1 Dallas, 312. In 6 Mod. 295, Lord Holt says, that after the sheriff has made his return, "levied on specific goods," the regular mode of proceeding is to 49] issue a *venditioni exponas* *when the sheriff continues in office, but the *distringas* when he has left it, but if he has "levied to the value of the debt," he is bound to sell without further process.

The plain inference from all this, is, that a writ of *venditioni exponas* is never issued but to a person in office, whom the court have

a right to command and who is under an obligation to obey the process.

If a sheriff, having levied upon goods and taken them into his actual possession, should die, and his administrator should refuse to sell or deliver them up, it is possible that under very peculiar circumstances, a *venditioni exponas* might be directed to him, though it is not easily perceived why he can not be distrained upon as well as the intestate. In the case of real estate this can never be necessary, because the possession is never changed by a levy, nor even sale on execution.

It is unnecessary to remark on the evident absurdity in directing an execution to the judge of the court from which it issues.

The practice of the court of common pleas of Hamilton county can hardly make the law of the land, when it is to divest a man of his freehold.

The amended return of December, 1812, which declared the lands not sold or on hand for want of bidders, ought not to have been set aside after the lapse of fifteen years, and the former returned reinstated, nor a deed ordered to be made more than seventeen years after the lands were sold—if sold at all.

In *Thompson v. Skinner*, 9 Johns. 556, the court say, that after the lapse of twenty years no judicial proceedings whatever ought to be set aside for irregularity; and in South Carolina it was so decided after twelve years. 2 Bay, 388. The most alarming consequences may be anticipated from such a practice. In this case a *venditioni exponas* was issued in the summer of 1813, and the premises might have been sold to some other person; if not, the judgment had become dormant. The acquiescence of the parties for the space of fifteen years furnished the strongest reasons for believing that everything in relation to the judgment and sale was arranged. If it was right to amend the return in December, 1812, it was wrong to vacate that amended return in November, 1827, and the acquiescence of the parties furnishes the best evidence *that it was rightly done. If the premises were actually [50 sold to Walker, and he paid his money, it is not necessary to decide what would be his remedy; it is sufficient to say that so important a result ought not to be produced by so summary and informal a proceeding.

Neither the act of February 16, 1805, or the act of 1824, authorize the sheriff to make a deed, for lands sold by his prede-

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cessor, unless such predecessor has gone out of office before making such deed. This is really nothing more than an enactment of the common law. If a sheriff sell or set off lands on execution, and die or go out of office before giving a deed or other requisite evidence of the sale, there is no doubt his successor may do it, for the office continues; but in this case Goforth was not in office at the time of the sale. It is, therefore, a case not provided for by the statute, and the common law has no provision for such a proceeding. It may well be doubted whether the authority of a sheriff to make a deed, under the provision of the act for lands sold by his predecessor, is not confined to the immediate successor of the one making the sale.

If it was too late for Fowble, in 1828, to set aside the execution of 1810, it was also too late to attempt to use it against him by setting aside the amended return of 1812, and confer upon the execution the effect it had in 1810. For the space of fifteen years that execution had remained on file declaring the lands of Fowble not to have been sold by it; and when it was attempted to give to the execution a totally different effect, by declaring his lands sold, it was surely competent for him to gainsay the validity of the execution. If the argument proves that the motion of Fowble to set aside the execution came too late, it also proves that the motion to set aside the amended return came too late.

WADE, for defendant:

The first question made by the plaintiff is, that the *venditioni* of September, 1810, was void, it being issued to A. Goforth, he being out of office, an associate judge or member of the senate at the time.

At the common law, an execution was considered an entire thing, 51] and when once acted upon, as by taking possession of *property, or perhaps advertising it, the person who thus begins must finish it. *Mason v. Sedam*, 2 Johns. Ch. 180. In the case of *Ayre v. Aden*, Croke Jas. 73, the sheriff had levied upon goods on a *fi. fa.* and was discharged from office before sale, but had not returned the writ; subsequently he sold the goods without a *venditioni*, and the question was, whether the sale was good without a *venditioni*. The court decided the sale was good, for the *fi. fa.* gave him authority to sell without another writ, and that his discharge from office did not affect the sale. Bacon, title Execution, 366, old edition; to same point, Bacon, title Sheriff, 466, old edition. If

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upon a *fi. fa.* the sheriff seizes goods, and returns that goods to such a value remain in his hands, *pro defectu emptorum*, and he is removed, yet he, and not the new sheriff, is to proceed in the execution, for execution being an entire thing, he who begins must end it. See also 1 Burrows, 34.

Reed v. Stevens, Cox, N. J. 265, the court decide that the executor or administrator of a deceased sheriff may sell lands seized in execution by a deceased sheriff. Clark v. Withers, 6 Mod. 298. The court say executions are favored in law. By a seizure the property is vested in the sheriff. The selling is but a formal part of the execution, and by the seizure and writ he has authority to sell. The *venditioni exponas* adds not to his authority, but is to spur him on to sell. The goods, by the seizure, are in *custodia legis*.

So it is contended that under our law, by a levy on land, it becomes as much in *custodia legis* as goods and chattels in England.

A second *fi. fa.* can not issue after a seizure; 2 Ld. Raym. 1075; Croke Eliz. 391; and it is contended that a second *levari facias* can not issue in this state, after a levy returned, until the first levy is disposed of by a sale, or be set aside. An existing levy, I think, would be a good plea in bar to an action brought on a judgment.

Jackson, ex dem. Scofield, v. Collins, 3 Cowen, 89. The court decide that a deputy sheriff may complete an execution by sale and conveyance of land, after the sheriff goes out of office, provided the execution was levied before. The court say, page 95, the authority of the deputy is limited by the duration of the authority of the principal. An execution *against the property of a defendant, [52 partly executed by the old sheriff, shall be completed by him, and in relation to such he continues sheriff.

Hempstead v. Weed, 20 Johns. 95. Even in case of a *ca. sa.* upon which a defendant has been arrested and is imprisoned, it is optional with the old sheriff whether he will transfer the prisoner to the new sheriff or retain him in his custody and complete the execution himself.

From the foregoing authorities it clearly appears to be the duty of the old sheriff to complete an execution begun by him. It is admitted that at the common law the usual process issued to compel him to do so was a *distringas*, but this by no means proves that a *venditioni* was an improper writ. On the contrary, in Ayres v. Aden, the *quære* was, whether a *vendi.* ought not to have issued, clearly recognizing it as a proper writ, when the sheriff had gone

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out of office. And the reason why the *distringas* was resorted to at common law, instead of the *vendi.*, was, I presume, that it was in its nature a more efficient writ than a *vendi.* Neither a *vendi.*, or *distringas* gave to the sheriff any new power, though both require him to exercise a power already vested in him by virtue of former writs.

But if the issue of a *venditioni* would have been erroneous at common law, still, as the practice of the courts, in this part of the state, prior to 1824, had invariably been to proceed in this way, it is presumed the court would not now be disposed to disturb it. There being no statutory provisions against it, the maxim that *communis error facit jus*, most forcibly applies. But it is by no means admitted to be an erroneous practice as the law then was.

I can not see how his being an associate judge could prevent his acting as sheriff, to complete executions begun by him while sheriff, nor can I see any absurdity in his doing this.

He was not judge, he was senator when he made the sale; and I am referred to section 26, article 1, of our constitution, on this subject. I do not see its application. If it establishes anything, it is, that he could not be senator while he had executions to complete.

By the statutes on executions of 1805 and 1808 (see Land Laws 338-343), under which this levy and sale was made, there is no [53] provision for the issue of a *vendi.* in any case, so *that, as at the common law, the sheriff acts by virtue of the power vested in him by the first writ of *fi. fa. et lev. fa.*, and the *vendi.* was a mere command, as at common law, to do that which he was before empowered to do. And it is contended that the sheriff might, but for the practice of the court, have sold at any time after levy, without a *vendi.*

The second position assumed is, that the amended return of December, 1812, ought not to have been set aside and the former one reinstated after a lapse of fifteen years; nor should a deed have been ordered after a lapse of seventeen years.

The application made by Walker to strike out the amended return made by Corry, and reinstate the one made by Goforth, was an appeal to the equitable power of the court. Of course they were bound to give such relief as a court of equity would give in similar cases; and I presume it will not be contended by the gentleman, that if Walker had filed a bill showing the same facts that he proved in this case, but that a court of equity would have de-

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creed him the land. It is laid down as a general rule in 6 Term 8, and 7 Term, 699, that the court can do whatever the ends of justice require in amending their records, and the application, so far as it related to the striking out of Corry's amendment and reinstating the other, comes within this rule. I would refer the court to *Hart v. Reynolds*, 3 Cowen, 42, on this subject.

But on principle the court erred in permitting Corry to alter the return made by the sheriff. By his return he had completed the execution in 1810, and even supposing the administrators might have completed the execution had it remained to be done, yet, being completed, he had no power over it. Supposing he possessed the power, yet, as Walker, the purchaser, was not a party to the judgment, he can not be held to be concluded by the act of Corry, unless it was proved that he had notice of the motion. Nothing of this kind was pretended. It is, however, contended that as fifteen years was suffered to elapse, it was too late to move to set the amendment aside, and the case of *Thompson v. Skinner*, 7 Johns. 556, is relied on. There the court say, after a lapse of twenty years no judicial proceeding should be set aside for irregularity. I want no other authority to prove us within time for such an application—fifteen years is not twenty. The gentleman's reasoning from lapse of time can not apply; here the purchaser made the motion, and it was opposed by the defendant, whose land was sold, not upon any pretense that an arrangement had been made between them, but upon the plea that it was now too late. The authority cited from Bay, 338, I have not seen, but presume that there must have been some peculiar reason for denying the application, after a lapse of only twelve years, as was the case in *Wilson v. Crompton*, Wil. 61, and *Wentworth v. Stafford*, Ld. Raym. 68, when the court refused the amendment of judgments, because it would be injurious to purchasers.

On the question, whether the court could order the present sheriff to make the deed, I think there can not be a doubt that he alone was the person to be directed to make it. The statutes of February, 1805, and the statute of 1824, use precisely the same language on this subject, to wit: "It shall be lawful for any succeeding sheriff or other proper officer, on receiving a certificate from the court," etc. Ohio Land Laws, 341, sec. 13; 22 Ohio State Laws, 113, sec. 14. By the expression "any succeeding sheriff," the legislature clearly meant, not to confine the making of

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a deed to the immediate successor of the one who made the sale, but to give the power to any successor, whether immediate or remote. And such I believe has been the uniform practice of the courts.

The statute of 1808 repealed sections 10 and 11 of the law of 1805, which provides for the extent of lands, if they will pay the debt in seven years. The judgment in this case was had after the law of 1808 came in force, which is an answer to the exceptions on this subject.

The fourth position assumed by the gentleman is not true, in point of fact. The court did not refuse to set aside the execution of 1810, because the application was made too late, but because they deemed the proceedings regular, and in conformity to the practice of the court. They did refuse to hear the motion made by Fowble, to set aside the proceedings had upon Walker's motion, and upon the principle that the party was present in court, had notice of the motion, and did not resist it until after the order was made. This was a matter resting in the sound discretion of the 55] court, which *they had a right to grant or not, as they thought proper; and it is believed can not be made the subject of revision on a writ of error.

In the exceptions it is said to be a case not provided for by statute, to make a deed where a sheriff sells land after his office expires.

By section 13 of the law of 1805, it is provided that if a sheriff, or other proper officer, hath made or shall make a sale of lands, etc., and the language of the statute of 1824 is of the same import.

If the court should decide it to have been proper and regular for a sheriff out of office to sell upon execution begun by him, then it would irresistibly follow that the statutes provide for the case, and that the order made by the court, upon the application of Walker, is proper—for the words of the statute of 1805 do not confine it to sales made while in office, but to such as are made by proper authority.

Opinion of the court, by Judge HITCHCOCK:

Previous to the act of 1824, "defining the duties of sheriffs and coroners in certain cases," it was a point frequently mooted among the members of the bar in this state, whether a sheriff, after the expiration of his office, could do any official act; although I am

not aware that the question was ever submitted to or decided by any of our courts. 6 Bac. 161. In England it seems to have been considered that a sheriff, having levied upon goods and going out of office, might proceed to sell under a *vendi*;^{*} and if the sheriff returned on the *fi. fa.* that he had seized goods of the value of the debt, and actually paid part of the debt after his term of office expires, he might sell without a *vendi*. If he neglected, a *distringas* issued to compel him to sell and bring in the money, or to compel him to sell and deliver the money to the new sheriff to bring into court.

But although a *vendi*. might issue to a sheriff after he was out of office, the *fi. fa.* having been levied by him while in office, still I apprehend this practice was not uniform. By section 9 of the statute of 3d George I., chap. 15, provision is made for settling the fees or poundage between a preceding and subsequent sheriff, where the *fi. fa.* is levied by the one *and the *vendi*. issued [56. by the other. 6 Bac. 161. It is true this refers to process out of the exchequer.

As lands in England are not subject to sale on execution, we can not expect to find in the reports of that country any decided case precisely in point, although there may be those which are somewhat analogous. There is a difference as to the effects of a levy upon goods and upon lands. Goods when levied upon are taken, or ought to be taken into the possession of the sheriff, and so far become his property that he may maintain an action if they are taken from him. If of sufficient value to satisfy the debt, and, if lost through his carelessness, he will be liable to the creditor, and may be made to pay the debt. The land, however, remains in the possession of the defendant, and in that possession he can not be disturbed until it is sold. Nor could the officer be called upon to pay the debt until that event had taken place. For these reasons there would seem to be more propriety in directing the *vendi*. to the new sheriff where the *fi. fa.* was levied upon lands than where it was levied upon goods. The goods might be retained, or may have been lost by the old sheriff, and thus never have come to the possession of the new one, while the lands would remain in *statu quo*. Still, if the execution be "an entire" thing, and that it is we have no disposition now to controvert, we can see no serious objection to adopting the rule that "he who begins shall end it," as well where lands as where goods are to be sold. At any rate, we must

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say that the English authorities, so far as they are analogous, seem to favor this practice. Such practice prevails in New York. In that state it has been decided that a deputy sheriff may complete a sale and make a deed after the principal is out of office, provided the levy was made before. 3 Com. 89.

In this state there was no express statutory provision upon the subject until 1824. We have endeavored to ascertain the practice before that time, for after all I can not but consider it a mere question of practice. So far as respects the interests of the judgment debtor, if his property must be sold on execution to satisfy the judgment, it is pretty much material whether it is sold by one sheriff or another. Either would be anxious to get for it all it would bring, and if it be real estate it can not, at any rate, accord-
 57] ing to our policy, *be sold for less than two-thirds of the appraised value. It was the practice of the general court of the territory to issue the *vendi.* to the officer who made the levy, and that practice was continuèd, in Hamilton county at least, under the state government. In that county, which is the most populous in the state, and in which the general court did more business than in any other, this course was invariably pursued, as appears from the case under consideration, until the act of 1824. Into how many counties this practice, after the organization of the state government, extended, we know not, but we do know that in some other parts of the state it was different. Probably in most of the counties the *vendi.* was directed to the sheriff in office at the time of the date of the writ. Neither course is without authority to support it. It is certain that a practice pursued in any one county for a great length of time does not make it legal. But where it has prevailed for more than thirty years, as is the case with the one under consideration, in the county of Hamilton, this court will not be disposed to interfere with it, unless it palpably violates some well-established rule of law. The mischief that would result from adopting a different course can not be foreseen. That it would be extremely great can not be doubted.

Although previous to 1824 there was no express enactment upon this subject, still there might have been other statutes bearing upon it. The several laws "regulating executions," and "regulating judgments and executions," seem to be of this character. From the enactment of the law of January 19, 1802, "regulating executions," to the present time, a principle has been contained in

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our statutes authorizing the successor of a sheriff, or other officer who had sold lands and was incapable of making a deed, to make a deed under the order of the court from which the execution issued, and providing that the deed thus made should be equally valid, as if made by the officer who made the sale. The law of January 19, 1802, was enacted by the general assembly of the territory, at which time the general court was the highest judicial tribunal of the country. It has already been remarked, that the practice of that court was to issue the *vendi.* to the same officer who made the levy. Ohio L. L. 334. Section 12 of this statute provides, "that if the sheriff, or other officer, who hath made or shall make sale of lands, tenements, *or real estate, by virtue of an execution [58 against the same, shall abscond, or be rendered unable, by death or otherwise, to make a deed for the same, it shall be lawful for any succeeding sheriff, or other officer of the county," etc., to make a deed, under the direction of the court from which the execution issued, the other provisions of the same section being complied with. This act, however, says nothing as to what officer the *vendi.* shall be directed. It does not interfere with the then existing practice of the court in this respect. This same principle is re-enacted in section 13 of the law "regulating judgments and executions," passed by the state legislature, February 16, 1805, and, with but one exception, is precisely in the same words. It is again introduced into the act upon the same subject, of January 25, 1810, and of which act it constitutes section 16. Ohio L. L. 348. It is again introduced as section 17 of the act "regulating judgments and executions," enacted January 31, 1816. 16 Stat. Laws, 170. It constitutes section 2 of the act of February 24, 1820, upon the same subject. 18 Stat. Laws, 188. In all the different statutes there is no material variation in the mode of expression. In all of them the provision is, "that if the sheriff or other officer," etc., "shall abscond, or be rendered unable, by death or otherwise, to make a deed," etc. On February 1, 1822, the legislature enacted a new law upon the subject of "judgments and executions," in section 13 of which we find the same, or a similar provision, authorizing a "successor" to make deed. 20 Stat. Laws, 68. But there is a change in the phraseology as to the contingency upon which it may be done. This provides "that if the term of service of the sheriff or other officer, who hath made or shall make sale," etc., "shall expire, or if the said sheriff or other officer shall abscond,

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or be rendered unable by death or otherwise to make a deed," etc., then the deed may be made by a "succeeding sheriff," etc. In the previous statutes it was made necessary to make an application to the court for an order upon "the successor" to make a deed where the officer making the sale had absconded, or where he was unable to make it. Under this statute it was necessary to do it, where "the term of service" of the officer making the sale had expired. Now, I can see no more impropriety in permitting a 59] *sheriff who has sold land upon execution, to make a deed of conveyance after his term of service has expired, than in permitting him to sell on *vendi.* or otherwise under similar circumstances, and it would seem to me that, under the statute of 1822, it would have been most proper to issue the *vendi.* to the sheriff in office on the day of its date. Whether this would be absolutely necessary I do not undertake to say. This statute, however, has nothing to do with the present case. The land was sold under the law of 1810. These statutes are referred to merely for the purpose of showing that up to the year 1822, the legislature in their frequent legislation upon the subject of executions, have said nothing which would lead to uniform practice in the direction of writs of *vendi.* It was left to the discretion of the courts. And, even after the statute of 1812 above referred to, the practice continued the same as before, different in different parts of the state. To remedy this evil, the legislature, in enacting the law "defining the duties of sheriffs," etc., passed February 25, 1824, provided, among other things, in section 8, that "no *venditioni exponas* shall hereafter be directed to, or executed by, any sheriff whose term of office may have expired," etc. Since that law the practice has been uniform throughout the state; before it was variant. From all the consideration we have given the subject, we are not prepared to say that the *vendi.* of the 5th of September was improperly issued, in being directed to the late sheriff, or that it was improperly executed, in being executed by the officer to whom it was directed.

The question next to be considered is, whether the court of common pleas erred in setting aside and vacating the amended return. It does not seem to be controverted that a sheriff or other officer may, by leave of the court, amend his return? Nothing is more common in practice, and no injury is thereby done to the parties litigant, so long as the return, when amended, is consistent with truth. If a false return is made, the party injured has

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a remedy by action. The order of the court of common pleas vacating the amended return, in the present instance, is complained of, not so much because such order was made, but because it was made after so great a length of time had elapsed. Although the order was to set aside and vacate an amended return, or *more properly speaking, to vacate an order previously made [60 by the same court, thereby reinstating the return originally made by the officer executing the process, still I do not perceive that it materially varies from ordinary amendments of returns.

I know of no law fixing upon any length of time as an absolute bar to motions for leave to make such amendments. The amendment may be made after the term of office has expired. 6 Bac. 160. In the state of New York it has been decided that after a lapse of twenty years, no judicial proceedings whatever ought to be set aside for irregularity. 7 Johns. 556. In South Carolina it has been said that it would be dangerous to set aside such proceedings twelve years after judgment. 1 Bay, 338. Which of these rules shall we adopt? If we take the New York rule, then the motion was made and the vacating order entered within time; if the South Carolina rule, then it was not within time. The opinions of the courts of other states are entitled to much consideration, and will, I trust, by this court, always be treated with respect. But before they can be received as conclusive upon us upon a question of practice, there must be a conformity of decision in the courts of the different states whose practice is referred to. Now the decisions above referred to, and they are cited by the counsel for the plaintiff, do not show this uniformity. Motions to set aside any judicial proceeding, or to amend any return, should undoubtedly be made within reasonable time. In New York, if it be done within twenty years it is well; but in South Carolina, it must be done within twelve. The inference I draw from this diversity is, that there is no positive rule of law upon the subject. Much, nay everything, must be left to the sound discretion of the court. A court should unquestionably be more cautious in permitting an amendment, after a great lapse of time, than where the transactions are fresh, and the circumstances may be supposed to be more fully within the recollection of the officer making the amendment. It can not but be seen, however, that the present case is somewhat peculiar in its circumstances. The sheriff had returned that he had sold the land and made the money. This return remained

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upon the execution during his lifetime, but after his death it was 61] amended at the suggestion of his administrators. *If the court were satisfied that the order for this amendment was improperly made, it was within their discretion to vacate it, thereby leaving the return upon the execution as it was left by the officer to whom it was directed, and by whom it was executed. The question now to be considered, is not whether this court, under similar circumstances, would have done as was done by the court of common pleas, but whether that court, in the exercise of their discretionary power upon this subject, have violated any principle of law. We do not perceive that they have.

It is further alleged, that the court erred in ordering a deed after the lapse of fifteen years from the time of the sale.

The law "regulating executions," passed January 19, 1802, and which has already been referred to, provided that if any sheriff or other officer, having sold land, should "abscond, or be rendered unable, by death or otherwise, to make a deed of conveyance for the same," etc., then "the successor" of such sheriff or other officer might, under the order of the court from which the execution issued, make a deed to the purchaser, which should, to all intents, be equally valid as if made by the officer making the sale. The same principle has been contained in all the statutes upon the same subject, and there has been no less than seven of them, besides amendatory acts, from that time to the present. In the present case the execution was issued from the court of common pleas. It was proven, to the satisfaction of that court, that sale was "fairly and legally made," and that the vendee "had paid the purchase money." The fact, that the purchase money had been paid, constituted, on the part of Walker, a strong equitable claim, and the proof introduced was such as, in contemplation of the statute, would require of the court, in ordinary cases, to make the order. It certainly is not a little extraordinary that the business should have rested for so great a length of time. Nothing seems to have been done in it from 1812 to 1827. This circumstance would undoubtedly make the court more astute in the examination of the testimony; still, as the statute makes no provision as to the time within which the order shall be made, we can not say that this circumstance, of itself, would be sufficient to render the order, when made, illegal.

62] *It has been urged in argument, that the deed thus to be

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made should be made by the *immediate* successor of the officer making sale. But is this a fair construction of the statutes on the subject? To the court it would seem that it is not. It is true that all the statutes "regulating executions," up to the year 1822, speak of "the *successor*" as the person who shall make the deed in case the officer making the sale shall be unable to make it. The definite article, "*the*" being made use of, perhaps the strict grammatical construction would confine the power of making deeds to the immediate successor of the officer making the sale. Courts, however, do not seek principally for grammatical construction in ascertaining the meaning of statutes. It is their duty to carry into effect the intention of the enacting power, although, in so doing, the rules of grammar may be violated. To arrive at this intention, perhaps there is no rule of more general application than this: to "consider the old law, the mischief, and the remedy." Suppose we apply this rule to the statute of January 19, 1822. I speak of this statute, because it is the first in our statute books which authorizes "*the successor*" to make deeds where his predecessor had made sale, and because since that time there has been no change upon the subject, certainly not before 1822. What then was the old law when this statute was enacted? The officer who made the sale must make the deed. What was the mischief? The officer who made the sale might "abscond, or be rendered unable, by death or otherwise," to make the deed; consequently the purchaser must lose the benefit of the purchase, and if the purchase money had been paid, must also lose the purchase money. What is the remedy? In case of the inability of the officer who made the sale to make the deed, any individual, who may subsequently hold the same office, may, under the direction of the court from which the execution issued, make the necessary deed and conveyance, which shall have the same effect, "to all intents," as if made by the officer making the sale. Adopt the construction contended for by the plaintiff's counsel and the mischief resulting from the old law would be but partially remedied. The *immediate* "successor" of the officer making the sale, might, as well as his predecessor, be "rendered unable, by death or otherwise," to make a deed. He might, in fact, vacate his office before a term of [63 the court from which the execution issued should intervene, in which the necessary order could be made. The intention of the legislature must have been to secure to the purchaser the benefit

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of his purchase; and this intention could not, in every case, be carried into effect were the construction insisted upon by the counsel for the plaintiff to prevail. However it might have been under the laws previous to 1822, the act of the 1st February of that year, "regulating judgments and executions," places the question beyond a doubt. Section 13 of that act provides, that if the officer making the sale shall be incapable of making a deed, then "it shall be lawful for *any* succeeding sheriff or other officer to do it. 20 Stat. Laws, 74. The same phraseology is used in the statute of February 4, 1824 (22 Stat. Laws, 113), under which statute the deed in the present case was ordered.

It has been further urged, that the *vendi.*, and the proceedings under the same, were irregular, inasmuch as there was no indorsement of *nulla bona* upon the writ of *fi. fa.* Had this been the fact, a difficult question might have been presented. But we are satisfied, from a careful examination of the record in this case, no question is presented as to the necessity of such indorsement. Counsel have been led into an error by confounding the case of Fowble v. Walker, decided at the present special session, with this case. In that case, it is true, it was proposed to show that there was no indorsement of *nulla bona*, but the court of common pleas rejected the evidence, as coming in at too late a period. In the present case, it does not appear whether such indorsement was or was not made.

Upon the whole, we are not prepared to say that there is anything erroneous in the decision of the court of common pleas; the same must therefore be affirmed.

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*JACOB FOWBLE v. CHRISTOPHER WALKER.

Party in court, when an order is made affecting his interest, and making no objection, can not, of right, be heard to make a motion to rescind such order. He must show some reason for his negligence, addressed to the sound discretion of the court.

THIS case came before the court in Hamilton county, and was adjourned for decision at this special session. The record discloses the following facts: On September 21, 1808, Rayberg and Taylor

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recovered judgment against Fowble for one thousand one hundred and fifty-five dollars fifty-three cents damages, eight dollars seventy-nine cents costs, in the court of common pleas, and eleven dollars twenty-nine cents costs in the Supreme Court. On October 21, 1808, a writ of *fi. fa.* issued to the sheriff of Hamilton county, returnable to December term of the same year. On this execution the sheriff, Aaron Goforth, returned: "I have levied on one hundred and six and one-third acres of land, in the northeast corner of section 25, township 3, and fractional range 2. Also, ninety-four and three-fourths acres, in lot 25, township 3, fractional range 2, which remains unsold." On May 1, 1809, a *vendit.* issued, upon which the sheriff made the following return: "I have held inquiry, and property of the annual rent of four hundred and fifty-four dollars sixty-two and two-third cents, and of the value of four thousand four hundred and twenty-six dollars sixty-two and two-third cents, was appraised by inquisition hereto annexed."

On the 5th of September, an *alias vendit.* issued, directed to Aaron Goforth, late sheriff of the county of Hamilton, on which the sheriff made return that he had sold the property to Christopher Walker, on December 8, 1810, for two thousand nine hundred and seventy-six dollars. This return was signed by "Aaron Goforth, late sheriff." Goforth died soon after and before any deed was made. At the December term, 1812, of the court of common pleas, on the application of William Corry, one of the administrators of the late sheriff, Goforth, it was ordered that the return made on December 8, 1810, should be amended, and it was accordingly amended to read as follows: "Property on hand for want of bidders." Subsequent to this another *vendit.* was issued, but no return made. Here the matter rested until the December term of the same court, 1827, when a motion was made, by [65 Walker, for an order to the present sheriff to execute a deed on the return made by the late sheriff, Goforth, upon the execution of September 5, 1810, and so to vacate the order and amended return, made at the instigation of the administrator of Goforth, at the December term, 1812. This motion was continued to the February term, 1828; and at that time, to wit: on the 26th day of February, it being proved that the purchase money had been paid, the court, upon examination of the whole case, made the following order:

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executor, No. 59, to December term, 1810, on judgment as follows: Damages, one thousand one hundred and fifty-five dollars fifty-three cents; costs, C. P. eight dollars and seventy-one cents, S. C. eleven dollars and twenty-nine cents. Interest from September 21, 1808. On motion, the court set aside the amended return made on the above execution, by the administrators of Aaron Goforth, deceased, and reinstate the former one, and order the said amended return to be held for naught, and that all the subsequent proceedings had by reason of said amended return, be also set aside and held for naught. Jacob Burnet sworn and examined. The court having carefully examined the proceedings of Aaron Goforth, Esq., late sheriff of Hamilton county, on the above execution, order it to be entered of record; they are satisfied that the sale of the property therein described, on December 8, 1810, to Christopher Walker, for the sum of two thousand nine hundred and seventy-six dollars, has been, in all respects, in conformity with the statute. It is therefore ordered by the court, that John C. Avery, Esq., sheriff of Hamilton county, make and execute a deed to the purchaser accordingly; and from testimony exhibited, court are satisfied that the proceeds of the sale have been regularly paid over."

On the following day, to wit, February 27, 1828, Fowble made a motion in the same court, to set aside and vacate this order, which motion was continued over to the 6th day of March and then overruled, the court refusing to sustain the motion, on the ground that opportunity had been offered to show cause why the order should not have been granted, but that none had been shown.

66] *When the motion was overruled, Fowble, by his counsel, tendered a bill of exceptions, which was sealed by the court, the bill of exceptions discloses among others, most of the foregoing facts. It also shows that while the motion of Walker was pending, Fowble was in court; that Goforth, when the sale was made, had ceased to be sheriff; that other judgments were recovered against Fowble, executions upon which were in the hands of the sheriff at the same time with the execution in favor of Rayberg and Taylor; that it did not appear that there was an indorsement of *nulla bona*; upon any of the writs of *fi. fa.*, etc.

The case now comes before the court, on a writ of *certiorari*, to reverse the decision of the court of common pleas, on the motion submitted by Fowble. Various errors are assigned, but it is deemed unnecessary to state them specifically.

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CASWELL & STARR, for plaintiff.

WADE, for defendant.

Opinion of the court, by Judge HITCHCOCK :

Notwithstanding the variety of facts which are spread upon the record in this case, and the variety of errors assigned, it seems to the court that the principles upon which it must be decided, are confined to a very narrow compass. Had the plaintiff shown cause against the motion which resulted in the order of February 26, 1828, while that motion was pending; had the court of common pleas adjudged the causes thus shown insufficient, and had the plaintiff tendered a bill of exceptions, spreading the same facts upon the record, as they appear upon the decision of his own motion of the 27th of February the question presented would have been different, and probably of more difficult solution. We should then have been under the necessity of inquiring into the validity of that order. The arguments of counsel, as well as the assignment of errors, seem to be predicated upon such a state of case. An examination of the record shows an entirely different case. It is the proceedings and decision upon the motion of the 27th of February *made by Fowble himself, and not upon the motion [67 made by Walker, at the November term, 1827, of the court of common pleas, which is said to be erroneous. Fowble, although in court, did not show cause against the motion first above referred to; he made no objection to the order; he lay back until the order was made, and subsequently submitted his own motion to the court, to set aside or vacate this order. The only question which can now be examined is, whether the court erred in refusing to sustain this motion.

Motions of this description, or those somewhat similar in their nature, are frequently made, and are always addressed to the sound discretion of the court. By sound discretion, I do not mean an arbitrary discretion, but such a discretion as may be exercised without the violation of any principle of law. Parties, not unfrequently, in the progress of a cause, lose advantages in consequence of their own negligence or laches, to which they may or may not be restored on motion, at the discretion of the court. If restored, it must be upon such terms as the court think proper to impose. Motions to set aside nonsuits or defaults, for new trials, to amend

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pleadings, etc., are within every-day practice, and it is discretionary with the court to grant or refuse them. Where, however, an advantage has been lost to a party in consequence of sheer negligence, it is rare, indeed, that a court will on motion grant relief. For instance, a defendant neglects to plead, and suffers judgment to go by default. It must be an extraordinary case, that will induce the court to set aside the default, unless the defendant offers some plausible excuse at least for his neglect.

The motion of Fowble is not so far dissimilar to those referred to, but that the same principle ought to govern in the settlement of it. Had he had no day in court, he would have appeared under more favorable circumstances. But he had a day in court, and it was owing to his own laches that he was deprived of a full investigation. He neglected to show any cause against the motion of Walker, until that motion was disposed of by making the order of 26th February. He made no excuse for this neglect, and on account of this neglect, the court not only refused to sustain, but overruled his motion of the 27th February. It was within the discretion of the court to grant or refuse it, and we are not prepared *to say, that in the exercise of that discretion, any principle of law was violated, that any error was committed.

The decision of the court of common pleas is affirmed.

**CLAUDIUS BUSTARD v. JOHN B. DABNEY, ADM'R, AND THE HEIRS
OF OLIVER FOWLER, DECEASED.**

Bill in equity to subject the real estate of a decedent in Ohio, where the heirs and representatives reside in another state, and where no letters of administration have been taken in Ohio, can not be sustained. The creditor may himself take letters of administration, and thus have complete remedy at law.

THIS was a suit in chancery, adjourned here for decision from the county of Clermont. The bill charges that Oliver Fowler died indebted to complainant; that he left a will, which was duly proven and recorded in the State of Virginia, where he died; that administration, with the will annexed, was granted to John B. Dabney,

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who assumed the execution of said trust; that complainant brought suit against him in the county court of Campbell county, Virginia, and at the November term of said court, in the year 1825, recovered a judgment against him for two thousand and seventy-six dollars seventy-four cents, and six per cent. per annum interest on two thousand dollars of said sum, from July 11, 1821, and on seventy-one dollars ninety-one cents, from April 27, 1822, and costs of suit. The bill further alleges that no part of said judgment has been paid, and that the administrator has no assets in his hands out of which to pay it. The bill then charges, that the decedent or testator died seized of certain tracts of land in the county of Clermont, describing them, and which are particularly described by the survey. The bill makes the administrator, widow, and heirs, parties, and prays that the lands may be sold to pay this debt and costs. The defendants are all non-residents. The infant heirs who are defendants, have filed their answer by Thomas Morris, their guardian *ad litem*. All the other defendants have failed to answer, and are in default.

BENHAM, for complainant:

The complainant insists that he is remediless at law; that he could neither attach the land, nor could he or any other person administer upon it. Administration in this state, can *only [69 be granted upon the estates of persons who die intestate. Here the person left a will, etc.

But if the complainant, as a creditor, could administer, he is not bound to do it; it is a trust the law compels no man to assume, *nolens volens*. Chancery jurisdiction is never denied upon the ground that there is a remedy at law unless that remedy be plain and direct.

Here there can be no remedy at law in the direct and ordinary way; no process can be served upon the administrator, or upon the heirs, as they all reside in the State of Virginia.

But the subject matter of the suit is trust and confidence. Since the time of Lord North courts of equity in England have decreed the distribution of assets. 1 Term, 134. By the laws of Ohio lands are *sub modo* assets for the payment of debts, the descent is cast *cum onere*. Equity jurisdiction, in cases of this kind, is entertained upon the principle that it belongs to courts of equity to enforce the execution of trusts. They will always see that the prop.

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erty of a decedent is applied in payment of his debts and legacies, as the will directs; and in cases of intestacy, according to the statute of distribution. 1 Mad. Ch. 466, 468, 469; 2 P. Wms. 211; 3 Atk. 527; 4 Ves. 607; 7 Ves. 197, 452. Lord Redesdale says the jurisdiction of the court not only extends to the trustee, who is rightfully possessed of the property, but to all persons who come into the possession of the property with notice of the trust. 1 Sho. & Lef. 262.

A creditor may file a bill against the administrator to compel administration of assets, as the cases above cited abundantly show.

In 4 Mum. 289, it is decided that a court of equity, where there is no executor or administrator, or where process can not be served at law, will settle a claim against the estate, and if necessary, at the same time compel the sureties of the administrator to account for his *devastavit*. *Vide* also 3 Mum. 194.

In this case the claim has been established at law, and no plea would be admissible in an action upon this record but *nul tiel* record.

70] *The doctrine now contended for is fully recognized, and all the cases reviewed by Chancellor Kent, in 4 Johns. Ch. 619, in point.

If the heirs of the testator were within reach of the process of our law, they could be made parties to this judgment by *scire facias*, and the lands which they hold by descent subjected to its payment.

If it be said that this proceeding may operate severely upon other creditors, I answer, *vigilantibus non dormientibus leges subveniunt*, and that the hardship might be equally great, under a proceeding against the heirs by *scire facias*, or in a proceeding by attachment.

No argument was submitted on the other side.

Opinion of the court, by Judge HITCHCOCK:

In all cases where application is made for the extraordinary interposition of a court of chancery, in granting relief, the first inquiry which presents itself is, whether the complainant has plain, complete, and adequate remedy at law. If he has such remedy, he must seek it through the courts at law. It is not sufficient for him to show that he is entitled to redress; he must show that he is entitled to it in the manner and in the court in which he seeks to obtain it.

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Our laws are different from those of England, and some of our sister states, on the subject of the settlement of estates. The only privileged debts with us are those contracted in the last sickness of a decedent and for funeral charges. All others are to be paid in equal proportion. To adopt any course of proceeding which would interfere with this principle, would have a tendency to defeat the policy of the law.

By the constitution itself, the court of common pleas is vested with the "jurisdiction of all probate and testamentary matters, granting administration, the appointment of guardians," etc. Art. 3, sec. 5. Every legislative provision which is necessary, has been made for the settlement of estates. The rights of creditors, as well as others interested, are well secured. Section 1 of the act "defining the duties of executors and administrators," 22 Statute *Laws, 125, prescribes the duty of the court of com- [71] mon pleas in the appointment of administrators, where any resident of the state may die intestate. If the widow, or next of kin, will not accept the trust, then any creditor of the intestate, who will apply, may be appointed. Provision is made in the same law, directing the course to be pursued, should a will subsequently be discovered and proved in court. From such time the powers of the administrator must cease, but his acts previously performed are obligatory. Section 24 of the same act provides for the appointment of administrators upon the estate of such persons as shall die leaving no property, real or personal, within the state, such person not having been a resident of the state. And further, that the same "rules and regulations" shall govern as in other cases.

Pursuing the provisions of this law, the complainant has complete and adequate remedy. He is a "creditor," and, if no other person will do it, may take letters of administration. His interest would be as well secured by adopting the course prescribed by this statute, as it would be were the court to sustain the present bill. Should the bill be sustained, the court would give the complainant no advantage over the other creditors, but would see that the avails of the property was distributed among them in proportion to their several demands. In making a distribution we should look to, and be governed by, the general law for the settlement of estates.

It has been urged in this case that the decedent left a will, and of course that it would be improper to apply for letters of administra-

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tion. This circumstance, however, can be no objection. Unless the will is produced, the court of common pleas of the county where the lands lie has an undoubted right, and is, upon application, bound to grant letters of administration. If the will be produced, then letters may be granted, with the will annexed. In either event the complainant secures his object of subjecting the lands to the payment of debts.

It is further urged that the complainant, being a creditor, although he *might* take letters of administration, still is not bound to do it. True he is not. The law will not compel him to assume [72] the trust. But when the law has provided a "plain and direct" remedy, this court will not interfere to give the complainant a different one merely to gratify his caprice. He may either accept the remedy prescribed or abandon his claim.

If there were no remedy at law this court would not hesitate to take jurisdiction, but inasmuch as there is, the bill must be dismissed with costs.

JAMES STEELE v. FIELDING LOWRY, SEN., PETER P. LOWE, AND OTHERS.

Deed of trust made by grantor, the grantees having agreed to accept the trust, and put upon record, is sufficient delivery.

Where a deed of trust conveys property to be held by the trustee, and disposed of, on the direction of the grantor, and invested in lands, for the benefit of the contemplated issue of a marriage, the property conveyed inures for the benefit of such issue, though the grantor die, without directing a sale.

If an administrator take goods on replevin, as the property of his intestate, from the possession of a person who is not owner, and on the trial judgment is rendered against him, equity will direct an assignment of such judgment, for the use of the real owner of the goods.

This was a bill in chancery, sent here for decision from Montgomery county. The principal object of the suit was to obtain the legal construction of a deed of trust, made by Sophia Lowry, deceased, of whom the defendant, Lowe, was administrator, and the other defendants, her late husband and her children by him and

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by a former marriage. So much of this deed as is material to a right understanding of the points decided is as follows :

"This indenture made January 4, 1822, between Sophia Cooper and James Steele," etc. The indenture, after reciting that Mrs. C. had property, goods, etc., that came to her from Mrs. Z. and a former husband, and that a marriage was intended between her and one Fielding Lowry, witnesses that she "gives and grants all her goods, rights, credits, etc., in trust; that the said James Steele shall sell and dispose of the same whenever, in the opinion of the said Sophia, declared in writing, a reasonable price can be obtained for the same, and shall vest the proceeds in the purchase of lands within the State of Ohio, to be conveyed in fee simple, to the child or children of her, the said Sophia, to be by him, Lowry, begotten, share and share alike; and in case the said Sophia shall die without issue, then to the heirs of the said Sophia in fee. And in further trust, that the said Steele shall permit the said Sophia to have, use, and occupy the said goods until, in the opinion of said Sophia, a reasonable price can be had for the same."

*The bill states that the marriage took place, and issue was [73] born living, to wit, Fielding Lowry, jr. Mrs. Lowry died in May, 1825, without any declaration, and having in possession the personal property specified in the deed. The defendant Lowe was appointed her administrator, and took an inventory of the goods, etc., found in possession of Lowry the elder, who declined to deliver possession to Lowe. Lowe, who considered the property assets to which he was entitled, prosecuted a writ of replevin, and judgment was rendered against him, in favor of Lowry, sr., for the sum of one thousand four hundred and thirty-six dollars and thirty-one cents. The bill claims that the administrator shall pay the debts of Mrs. Lowry, and prays that the residue may be paid to the complainant, for the benefit of her heirs general, and an injunction to prevent the collection of the judgment recovered by Lowry, sr., against Lowe.

The answer of F. Lowry, sr., denies that the trust deed was ever delivered to the complainant, but states that it was left in the hands of the defendant, and there remained until the death of his wife. He claims the property in his own right, as having been reduced to his possession during coverture, or in right of his infant son, issue of the marriage. The answer of P. P. Lowe, the administrator, admits the principal allegations in the bill, and wishes

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the business amicably settled. There are interrogatories filed which do not materially vary the above facts. The infants answer by guardian.

The testimony of Henry Bacon, who drew the trust deed, shows that the facts were known to Lowry, sr., who advised the course. Steele was not present when the deed was executed by Mrs. C., but had been consulted, and agreed to be trustee. The deeds were executed, and directed by the grantor to be put on record, and delivered to the complainant.

Upon this state of the case, three different claims were set up to the personal property enumerated in the deed of trust.

1. F. Lowry, sr., the husband, claimed that the deed was inoperative, and the property vested in him, by possession in right of his wife.

74] *2. F. Lowry, jr., claimed that the entire interest was secured to him, unless the proceeds were necessary for the payment of debts.

3. For the children of Cooper it was claimed that the trust enured for the benefit of the heirs general of the grantor.

The administrator also claimed that the proceeds should be applied to the payment of the debts of the grantor, his intestate, whether incurred before or after her marriage.

STODDART, for Lowry, sr., contended that the deed of trust to Steele had never been so delivered as to operate.

COLLETT and CORWIN, for F. Lowry, jr., argued that the deed of trust was intended as a provision for the issue of Mrs. C.'s contemplated marriage with Lowry, if she should have such issue, as was evinced by the provision, that on the failure of such issue, the property should go to her heirs general. They cited Reeves Dom. Rel. 182; 3 Term, 618; 2 P. W. 255, 266, 489; 1 Mad. 52; 4 Ves. 708; 5 Ves. 495.

CRANE, for the children of Cooper, maintained that the deed created a general trust for the children of the grantor, reserving a power to direct herself that the whole should go to the issue of the marriage, and that this power never being executed, the trust must be held to operate for the use of all.

The claim of the administrator as to the payment of debts, not

being embraced in the opinion of the court, it is not necessary to notice what was urged in support of it.

By the Court:

It is said, that delivery is either actual, by doing something and saying nothing, or verbally, by saying something and doing nothing; or it may be, by both. So a deed may be delivered by him who makes it, or by any person of his appointment or authority precedent, or assent, or agreement subsequent. Shep. Tou. 55. A deed delivered in trust, for the grantee, is sufficient. 2 Mass. 449. If a deed is read *and not formally delivered, [75 but left in the same place, this is a delivery in law. Crok. Eliz., & Co. Lit. 360. Here the grantee had consented to accept the trust, and the grantor with the knowledge, consent, and approbation of her intended husband, executed the deed, and directed it to be recorded and delivered. The testimony leaves no doubt of the delivery according to the strictest formalities of the common law. 1 Johns. Ch. 250.

This deed passed the entire estate to the trustee, for the benefit of the issue of the intended marriage, and for want of issue, then to the heirs general of the grantor, reserving the use of the personal property, and a discretion in the donor, as to the time of the sale of the estate. The reservation of power was to direct the sale, whenever, in her opinion, a reasonable price could be obtained. The terms of the reservation would probably embrace the whole estate, both real and personal. The principal object was to turn the personal into real estate, for the proceeds were to be invested in lands in this state. This discretion was a mere division of the trusts for the more effectual security of the issue. Where there is a clear intention that a person shall take, and the mode only is left to the party, that is a trust, which shall never fail by non-execution, or inability of the trustee to exercise it. Brown v. Higgs, 5 Ves. 495.

It would be most unreasonable that the *cestui que use* should lose the whole estate, because the discretion of directing the time of sale was prevented by the death of the trustee. If the principle should be admitted that there was a resulting trust, by the non-appointment of the grantor, the effect would be a distribution of the estate among the heirs general of Sophia Lowry, expressly contrary to her intention. She has declared, in her deed, this

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distribution shall not take place, unless she should die without further issue.

The case of *Cook v. Brooking*, 2 Ves. 51, was very much like the one under consideration. Mallock devised fifteen hundred pounds to S. and J. Snow, to be disposed of upon secret trusts, revealed to S. Snow, who declaring in writing, they should, of the profits, maintain the testator's daughter, Anne, then married, and in case she should survive her husband, she was to have the whole sum; but, in case she died in the lifetime of her husband, then the 76] fifteen hundred *pounds were to go to his daughter L. in such shares and proportions as Anne should advise. Anne died in the lifetime of her husband, and made no appointment. The court held that this was not a resulting trust, and distributed the money amongst the children of L. *per stirpes*. Whether we consult the obvious intention of the donor, or the principles of law applicable to the case, the result is the same, that here is no resulting trust to the heirs of Sophia Lowry, in consequence of her death without declaring her opinion that the time had arrived when a reasonable price could be obtained for the property, secured to the issue of the marriage. The complainant, therefore, as *cestui que trust* for the infant defendant, F. Lowry, jr., is entitled to the property, or its value, either from Lowry the elder, or the person who has obtained the possession of it from him.

But it appears from the pleadings that the defendant, Lowe, as administrator of the estate of Sophia Lowry, prosecuted an action of replevin against F. Lowry, sr., for the personal property mentioned in the deed of trust, and that, having failed to establish his right, judgment has been rendered against him for the sum of one thousand four hundred and thirty-six dollars and thirty-one cents, the value found by a jury under the provisions of the statute. The property belonged to neither of the parties to the suit, and yet the defendant has obtained a judgment for its full value. The law has either transferred that property to the plaintiff, which clearly does not belong to him, or there is a penalty at least to its full value for commencing a groundless action. This is a view of the statute not very favorable to its provisions, as a substitute for the writs, *de retorno habendo* and of *withernam*. It is fortunately, perhaps, not now necessary to consider whether Lowe would be also answerable to the trustee for the property, or its value, in case he elected to bring an action at law upon the tortious possession of

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the administrator. This court thinks that without violating any principle of equity, the judgment in favor of Lowry the elder, can be taken as a trust fund for his infant son. This is upon the grounds that the judgment is more beneficial to the infant than the goods in specie. Lowe can not be aided in this court. This has already been determined in the case of Lowe, Administrator v. F. Lowry, sr., et. al. The *proceedings in replevin have [77 transferred to him the possession of the property, and charged him with the judgment. He must abide by this bitter law. But as that judgment is the proceeds of the infant's property, and as neither the plaintiff nor the defendant in the action had a shadow of legal right, equity requires that Lowry, sr. should transfer it to *cestui que trust*, to be applied according to the declared intention of Sophia Lowry. The court decree that F. Lowry, sr., assign the judgment recovered in an action of replevin against P. P. Lowe, except the costs, to the complainant, who is to collect the same in the name of Lowry, who is perpetually enjoined from interfering with the collection thereof, or from discharging or releasing the same, or the proceeds thereof. And, as to the other defendants, the bill is to be dismissed. And it is further ordered and decree that the costs of this suit be paid out of the proceeds of the judgment, and the residue be retained by the complainant, for the further directions of this court.

PETER P. LOWE, ADMINISTRATOR OF SOPHIA LOWRY, DECEASED, v.
FIELDING LOWRY, JAMES STEELE, AND OTHERS.

Bill of peace can not be sustained with respect to personals, where no title is established at law, and it is not necessary to prevent a multiplicity of suits. Party prosecuting at law, a groundless action of replevin, can not be relieved in equity against the legal consequences.

THIS was a bill in chancery, which was adjourned here for decision from Montgomery county, in connection with the preceding cause, between the same parties. The facts necessary to state, for a clear understanding of the decision of the court, are these:

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In the month of January, 1822, Sophia Cooper, widow and relict of Daniel C. Cooper, deceased being possessed of considerable personal property, and some real estate, both in her own right, and as dower in her late husband's estate, being also the mother of two children, sons of herself and D. C. Cooper, deceased, in contemplation of a marriage with the defendant, Fielding Lowry, made a conveyance in trust, of her principal property, real and personal, to the defendant Steele, to hold the same for her own use, 78] during her *contemplated coverture, and for any issue that might spring from it, reserving a power in herself, at any time, to direct the trustee in making certain dispositions of the property. The marriage took place, and there was issue of it, one son, the defendant, Fielding Lowry, jr. The property remained in the possession of Mr. and Mrs. Lowry, and was considered subject to the trust, until her death in 1825. She had contracted some debts during her widowhood, which remained unpaid. Some debts arose during her marriage with Lowry, in improving her real estate, and the expenses of her last sickness and funeral were to be paid. The plaintiff Lowe, at the request of the defendant Lowry, took letters of administration to Mrs. Lowry, and under these, he claimed from Lowry, in whose possession they remained, the personalties included in the deed of trust. Lowry refused to deliver them, upon which Lowe, having had them appraised, brought a replevin against Lowry, and thus obtained the possession. On the trial of the replevin, a verdict was rendered against Lowe, and damages given in favor of Lowry for twelve hundred and fifty dollars seventeen cents, as the value of the goods, one hundred and twelve dollars eighty-seven cents, as interest, and sixty-nine dollars twenty cents as costs.

The bill sets out these proceedings, and also sets out the debts due from Mrs. Lowry, and the means within the reach of the administrator to pay them. It prays a decree, charging the estate of Mrs. Lowry with these debts, and requests that some order be made for the legal disposition of the balance, asks an injunction against the judgment obtained by Lowry in the replevin suit, and prays for general relief.

The defendant Steele admitted the facts stated in the bill; Lowry demurred.

Lowe, for complainant.

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BACON, for defendant.

By the COURT:

There is no equity in the bill upon which the complainant can be relieved. Its chief object, though somewhat dimly *pre- [79
sented, is that of a bill of peace. But the subject matter does not relate to real estate, and as to the personal, the complainant has established no right at law. This is deemed indispensable to sustain a bill of peace, unless an issue is necessary to bring in different interested parties, and thus prevent litigation, and a multiplicity of suits. 2 Johns. Ch. 281.

There seems to be no ground for relieving the complainant against the judgment at law, in the action of replevin. There is no allegation that the complainant was ignorant of any material fact since discovered; no suggestion of fraud, accident, surprise, or mistake. No circumstance is charged in the bill to warrant a conclusion that the judgment at law is not according to the right of the case. On the contrary, we are satisfied, from another case which has been before us in connection with this, that the judgment against the complainant in replevin is unimpeachable. The facts that he prosecuted a groundless action, and that the result has involved him in a heavy responsibility, supply no grounds for his relief here. If the peculiar provisions of the statute regulating the proceedings in replevin operate hardly in a particular case, that circumstance invests the court with no power to relieve against them. 4 Ves. 639. The injunction must be dissolved, and the bill dismissed with costs.

LAWRENCE KING v. NATHAN KENNY.

Original survey and orders in the commissioners' books are admissible evidence, in the place of authenticated copies.

THIS was a writ of error to the court of common pleas of Athens county, brought to reverse a judgment rendered in that court, in a case where the plaintiff in error was defendant, and the defendant in error plaintiff. It was an action of trespass with force and arms, for breaking and entering plaintiff's close, breaking down

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and carrying away fences, and for carrying away and converting rails. Plea, not guilty. Verdict and judgment for the plaintiff for five dollars and costs.

80] *At the trial, the defendant took a bill of exceptions to the admission of certain testimony offered by the plaintiff. The testimony offered and excepted to, consisted of the commissioners' books, containing the minutes of the proceedings of the commissioners in laying out a road, and the original report of the reviewers and plat of survey, without a record of either. Upon this bill of exceptions the writ of error was founded, and the error assigned was the admission of the testimony.

H. STANBERRY, for plaintiff in error:

Section 4 of "the act for opening and regulating roads and highways," 22 Stat. 306, in directing the manner of laying out county roads, provides, among other things, that the line of the proposed road shall be viewed and surveyed, and that the survey and report of the viewers "be recorded, and from thenceforth such road shall be a public highway."

The language of this section is perfectly plain and explicit. It points out, distinctly, every step which is to be taken in the establishment of a road, and finally requires the plat and report (which show the location) to be recorded, and from thenceforth it is a highway.

This provision is capable of but one construction. Until the record is made there is no road. It is useless to inquire into the expediency of this enactment. The law is so written, and with that clearness of expression which concludes all argument, and makes manifest the intention of the legislature.

The plaintiff below attempted to prove the establishment of a county road according to the provisions of this statute; and for this purpose he offered the original report and survey, unconnected with any record of either. The court below held them to be proper evidence of the establishment of the road, and permitted them to go to the jury. It will be remarked that there was no attempt to show that these papers had ever been recorded; no foundation laid for their admissibility as secondary evidence. They are treated by the court as proper and independent evidence.

81] *Can the statute, by any latitude of construction, be reconciled with this decision? The legislature say that the record shall

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be made, and then the road becomes a public highway. What, then, is the essential evidence of the establishment of the highway? Beyond question, it is the record. But the court below held the record to be immaterial—that it need not be shown to exist, and that the original unrecorded papers evidence the legal (in other words, the statutory) highway. It seems to me it were as well to hold the original files and minutes of a court the proper evidence of its proceedings—or an unregistered deed admissible, where the laws require it to be recorded.

It will be urged that if all the steps required by this statute are to be followed, great inconvenience will be felt, and many roads, now used as public highways, be vacated. And if it were admitted that these consequences are likely to follow, could that change the obvious construction of the law or the settled rules of evidence? The legislature fix the law and determine its policy; the court declare what has been enacted. It is true, and perfectly proper, that, in aid of a doubtful construction, arguments, from inconvenience, do apply; but where the law is express, the intent manifest, they, surely, can have no weight. But there is, in truth, no inconvenience in requiring that at least this clause of the statute be followed. The record is easily made, and furnishes lasting and satisfactory evidence of the true location of the road. In New York the statute regulating highways provides two modes by which public roads may be established. The first is where they are laid out by commissioners according to the directions of the act. The second is where they have been used as public highways for twenty years preceding March 21, 1797. The commissioners are to cause the highways laid out by them to be recorded. Under this act it seems to be admitted, as of course, that the record is essential in the establishment of a road by the commissioners. *Colden v. Thurbur*, 2 Johns. 424; *Sage v. Barnes*, 9 Johns. 365.

It may be further urged by the defendant in error, that if such strictness is required in proving the establishment of a road, no man can travel on the public highways without being in danger of an action of trespass. That argument *does not apply to [82 this case. Where a road is opened, and has been used as a public highway, the traveler who passes along it would hardly be liable to the action of the owner, or, if sued, be held to any other proof of justification than of the fact of its being so used. And for a very obvious reason. The owner of the soil, while he suffers it to remain

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open and be used by the public as a highway, gives to the public a license to travel there. But the case presented by the bill of exceptions is totally different. There was no proof of a road in fact; no license or *user* shown. The plaintiff below undertook to prove the establishment of the highway according to law, and in that he failed.

It would follow, then, that if this statute is to have any effect, or to be expounded by the known rules of construction, the opinion of the court below was erroneous.

No argument was submitted for the defendant in error.

By the Court:

The error complained of in this case is, the admission of original documents in evidence instead of authenticated copies. It is clear that the question, as presented in the record, is not a mere abstract proposition, as applicable to any other case as to this. In such cases, a bill of exceptions does not lay the foundation for a writ of error. 1 Cranch, 310. Another rule as to the bills of exceptions is, that the party excepting must distinctly point out wherein he may have been prejudiced by the decision excepted to. 2 Caine, 169; 8 Johns. 387.

But waiving this consideration, the court are called upon to determine the points, whether the original papers with the minutes of the commissioners are admissible evidence to show the establishment of a road, or whether the record makes the public highway. The statute declares, the commissioners shall cause the report, survey, and plat to be recorded, and from thenceforth the road shall be considered a public highway. The petitioners, the reviewers, the surveyor, and commissioners performed the whole duties under the law. The omission was in the clerk of the commissioners. It would seem unreasonable that such ministerial *nonfeasance* should render the whole 83] proceedings nugatory. *To authorize this construction for such omission would require precedent and authority; but, in fact, they are the other way. When all the requisites have been performed which authorize a recording officer to record any instrument whatever, it is in law considered as recorded, although the manual labor of writing it in a book kept for that purpose has not been performed. *Marbury v. Madison*, 1 Cran. 161; 10 East, 350. The commissioners holding a public office, and entitled to the cus-

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tody of their own records, can not be compelled to produce the originals in court; but when presented they are as good evidence as copies can be, authenticated in the most ample forms of law. Courts, for a most obvious reason, will not compel the production of their own original records, as evidence for parties, or those of any other public officer; but have never refused to admit them on the grounds that they were not of as high a nature as copies. Indeed, it is a general rule, which admits of no single exception, that originals are good evidence where copies would be admitted. 1 Starkie Ev. 151. The authenticity of the copy can not be made more perfect than the record itself. A record, therefore, may be proved by mere production. It appears in this case the original documents were before the court, as well as the minutes, and we will not inquire how they came there. When these proceedings were found in the possession of the party offering them in evidence, the court below had no further inquiry than to reject or admit them.

Judgment of the court below affirmed.

CALVARY MORRIS, SHERIFF, ETC. v. JOHN MARCY AND OTHERS.

Bond taken by the sheriff for defendant's appearance on attachment is valid.

THIS was an action of debt, adjourned here for decision, from the county of Athens. The declaration was upon the obligatory part of the bond, in the usual form. The defendant, Marcy, craved oyer, and set out the condition in these words:

* "The condition of this obligation is such, that if the above- [84 bound John Marcy shall and does appear before the judges of the Supreme Court, to be holden at Athens, in and for the county of Athens, on the first day of the next term, and answer unto what shall then and there be objected to him, by the State of Ohio, and not depart the court without leave, then," etc.

Upon the oyer, the defendant Marcy, pleaded:

1. *Non est factum.*

2. That the bond was executed by Marcy, as principal, and his co-defendants as his sureties, to the plaintiff Morris, as sheriff, and

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that at the time when the bond was so executed and delivered, the sheriff had not served, and was not serving any writ of *capias* against said Marcy, upon any indictment found, etc.

To this plea the plaintiff replied, that the Supreme Court, sitting in Athens county, awarded a writ of attachment against Marcy, for contempt, returnable to the next succeeding term, which writ was duly issued, and put into the hands of the sheriff, commanding him to take the body of said Marcy, etc., upon which writ he arrested Marcy, and at his special request took the bond, etc.

The defendant demurred.

H. STANBERRY, in support of the demurrer, maintained :

That the statute law of Ohio, the act providing for the service and return of process, Vol. xxii. 193, did not extend to the case of an arrest upon attachment, and could not be sustained as a statutory bond. As a common law bond, he contended it was void, as taken for ease and favor. He distinguished it from cases where bonds were taken, under a proper authority, but not in strict conformity with the directions of that authority. He also insisted, that bonds of this description were against public policy. He cited, 1 Stra. 479; Com. Rep. 264; 1 H. Bl. 468; 5 Mass. 541; 4 Term, 505; 2 H. Bl. 418; 2 Ohio, 284.

J. OLDS, for the plaintiff, and in support of the bond, contended :

That statutory authority to take the bond was not essential to its validity. 7 Mass. 200; 8 Mass. 373; 12 Mass. 367; 2 Dall. 122; 85] 1 Saund. 200. He argued that the *English cases cited were founded upon the Stat. 23 Hen. VI., which contained a clause prohibiting the officer from taking a bond, *colere officie*, where express authority was not given.

By the Court :

The court are called to decide, upon the pleadings, whether, on attachment for contempt, the sheriff can take bail or not. The defendants do not rely upon performance of the condition, nor upon any excuse for non-performance; but, upon the fact that the sheriff took this bond, and discharged the prisoner, "without having any *capias* upon indictment found." The fourth section of the act to which this plea refers, authorizes an arrest in any county in the state, and directs the person to be committed, or held to bail,

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as shall be provided for by law, etc. By the act "defining the duties of sheriffs and coroners in certain cases," the sheriff must preserve the public peace, and cause all persons guilty of a breach thereof, within his knowledge or view, to enter into a recognizance with sureties, for keeping the peace, and appearing at the succeeding term of the common pleas, etc. The authority to take bail upon an attachment for contempt, is not expressly given to the sheriff by either of these acts. The necessity of issuing a *capias* for contempt, appears not to have been in the contemplation of the legislature, when they were under consideration. To enable the plaintiff to recover upon this bond, the power of the sheriff to take bail, must either be found in the usages of the common law, or be justly inferred from the provisions of our statutes.

At common law, bail was allowed for all offenses except murder. 2 Inst. 190. The accused might be bailed until convicted of the offense. 2 Inst. 186; *Rex v. Daws*, 2 Salk. 608. Daws was taken by attachment for contempt, and the sheriff took a bail bond for his appearance. The court agreed that a bail bond might be taken by the sheriff on attachment. A resolution of the judges appears afterward contrary to this. 1 Strange, 479. Both of these decisions grew out of the statute, 23 Hen. VI., c. 10, and the reasons are not given in either case. At common law, the sheriff was not compelled to take bail for the appearance of his prisoner, *but might of his own accord. 1 Vent. 55. By 1 Statute [8th of Westminster, the sheriff is forbidden to take anything for the escape of a thief or felon, unless it be first judged an escape by the justices in Eyre. 2 Inst. 164. North, C. J., in delivering the opinion of the court, in *Ellis v. Yarborough, sheriff, etc.*, 2 Mod. 181, says, "the common law was very rigorous as to the execution of process; the *capias* was *ita quod capias*, the body at the day of the return, and if the sheriff had arrested one, it had been an escape to let him go. Before this statute, 23 Hen. VI., c. 10, the sheriff usually took securities for the appearance of the prisoner, and by this means used great extortion, etc., to prevent which mischiefs, this statute was made and so designed." It seems, therefore, quite clear that, before this statute, the sheriff might take bail in criminal cases, although not compelled to do so. If the prisoner failed to appear, it was an escape; but the undertaking of the sureties was not void, and it would seem not void,

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although taken for ease and favor, before the statute, 23 Hen. VI. So here, the sheriff might be liable, in the first instance, for the escape; but it would not follow that the bond taken for appearance would be void. We, therefore, conclude that the taking of the bond was warranted by the principles of the common law, and can not be avoided by the obligors, unless the statute law restrained the powers of the sheriff. But if this exercise of authority was not warranted by common law, it would be worthy of inquiry whether it is not fairly inferable from our statutory regulations. It will not be seriously controverted, that a power to let to bail in criminal cases is one which can not safely be intrusted to those officers. The legislature has granted it to them upon indictments found and breaches of the peace. If it is proper to be exercised after the guilt of the accused has been found by a grand jury, no sound reason could be discerned why it should not be before. The presumption of guilt is certainly stronger *after* than it is *before* indictment found. The statutes enlarge, but do not restrain the powers of the sheriff to take bail. We are forced to the conclusion, that the legislature intended to include the exercise of the less responsible power in the grant of the greater. This view of the powers of the sheriff is fortified by an examination of section 19 of the act, "pointing out the mode of trying §7] criminals." *If we give this act the strict construction insisted upon by the defendants, for the one to which their pleadings refer, a person imprisoned on attachment for contempt, however small the offense, or weak the presumption of guilt, would, in many instances, owing to casualties not unfrequent in this court, be compelled to suffer a most wasting imprisonment without bail or mainprise. The act last referred to, if taken literally, and without latitude of construction, would only authorize a judge to admit to bail when the prisoner is confined by *warrant*, or *capias upon indictment*. This would be placing one who had merely disobeyed the orders or rules of court, in the situation of him who was under a charge of a capital crime. The statute should be very explicit to do this. While the rules of construction will admit of a different interpretation, the court should not put this harsh one upon them. The right to exercise this power by the sheriff is less doubtful than by a judge under the act above referred to. If neither have the power, the legislature must have widely departed from the general character of our criminal juris-

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prudence, which is to extend to the accused every indulgence consistent with the public good. We think they have not so departed.

The defendant's principal has received the full benefit of the condition of the bond, which is neither opposed to sound public policy, the usage of the common law, nor the provisions of any statute of the state; but, on the contrary, the right to take it is fairly implied in the powers given to the sheriff, in cases requiring more prudence and discretion, and seems to accord with the mild character of our criminal jurisprudence. The demurrer to the replication is therefore overruled.

Judgment for the plaintiff. Judge SWAN was ill, and did not sit. Judge HITCHCOCK dissented.

*LESSEE OF E. S. HAINES v. THOMAS J. LINDSEY. [88

Deputy sheriff may execute a valid deed for lands sold on execution by himself or principal.

Warrant deputizing an under-sheriff, filed with the clerk, need not be indorsed to make it valid.

THIS case came before the court on a motion for a new trial, made by the defendant; the decision of which was adjourned here from Clermont county. The defendant claimed title under a sale upon judgment and execution, the sheriff's deed being executed by the deputy sheriff. At the trial this deed was rejected, with leave that the defendant move for a new trial, for error in the court in rejecting that deed.

T. MORRIS and T. MOOREHEAD, in support of the motion.

ESTE, against it.

By the COURT:

In the most ancient times of the English common law, the sheriff had his under-sheriff. 6 Com. Dig. 413. Such deputy, when appointed, was vested with authority to perform every ministerial act that the principal sheriff could perform. The power

given the principal sheriff, by our statute, is but in affirmance of the common law, and must be considered as clothing the deputy with the ordinary authority exercised by the deputy sheriffs at the common law; and we think that upon just principles of analogy, the power to make conveyance of lands sold under execution may be legitimately exercised by the deputy.

The writ of *elegit* in England directed the sheriff to hold an inquisition upon the debtor's lands, and according to the finding of that inquisition, set off to the plaintiff, in execution, a certain portion of those lands to be held, at an annual rent, until the debt is paid. The inquisition and sheriff's return upon the writ are the evidence of the creditor's right to the possession of the lands. It has been adjudged, not only that a deputy sheriff may take an inquisition, and make an *extent* upon *elegit*, but that the bailiff of a liberty may do it, by warrant under him. Croke Cha. 319. In 89] our state, the order of the court confirming a sale, and the sheriff's deed in conformity with that order, are essential items of proof to sustain the purchaser's title. And there is certainly nothing but what is strictly ministerial, in executing the deed, when the court, acting judicially, have confirmed the sale. Holding an inquisition upon *elegit* bears a much stronger semblance of exercising a judicial authority.

In New York it is settled that an inquisition of damages may be held by the deputy sheriff. 2 Johns. 63. The very question presented in this case has been directly decided in that state, and the validity of a sheriff's deed executed by a deputy sustained. 10 Johns. 223; 7 Cow. 737. The statute of New York authorizes the sheriff, "by writing under his hand and seal, to make some proper person under-sheriff," etc. It directs that "such be recorded in the office of the clerk of the county;" but it does not define what shall be the powers of the deputy, in the life of the principal. In case of his death, it declares "the deputy shall, in all things, execute the office of sheriff of the same county." Our statute is much stronger than this, for it directs that the warrant appointing the deputy shall authorize him "to perform all and singular the duties appertaining to the office of sheriff, within his respective county." These duties he may perform in the life of the sheriff and as the execution of the deed, after a sale of real estate is one of them, we consider the authority as vested in the deputy by express terms.

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In this case an exception is taken that the warrant constituting the deputy has not been filed agreeably to the provision of our statute. It appears to have passed through the proper office before it was placed with the papers in this cause. There is no further evidence that it was filed. In our practice, the ordinary evidence that a paper has been officially filed, is the clerk's indorsement of that fact upon the back of it. But we are not prepared to say that it can not be filed unless thus indorsed, or that no other evidence than the indorsement can be received to establish the fact of filing. It would be especially dangerous to suspend the validity of titles to land upon any practice of a ministerial officer, regulated by no positive law, and not so supported by usage and precedent as to constitute an unbending rule. The exact time when a paper is placed upon file frequently is *very material to rights arising under it, and, for this reason, the practice of indorsing the fact and the date upon the paper itself meets the entire approbation of the court.* Still, had the paper been placed in the office, either strung upon a thread, or laid in a drawer or pigeon-hole, we conceive it would be filed within the terms of the law. The fact of filing it is to be regarded as a matter *in pais*, seeing there is no law directing it to be made matter of record. In the absence of all testimony with regard to the paper, except that it had been in the clerk's office, before it was used in the cause before us, we feel bound to presume that it was regularly filed. If the deputy deposited his warrant of deputation with the clerk, and that officer omitted to file it, we are not satisfied that the power of the deputy should be deemed void upon that account. 1 Cranch, 161. But it is not necessary now to express an opinion on this point. The verdict must be set aside, and a new trial granted; the costs to abide the event of the suit.

JONATHAN HOLMES v. JOHN ROBINSON.

Judgments, in the same rights may be set off, on motion; but in a case where different interests are involved, it ought not to be done.

THIS was a motion made by Holmes to have a set-off of certain
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judgments between the parties. Holmes had recovered two judgments against Robinson, in the courts of Franklin county, for an aggregate amount of more than one thousand dollars. Robinson, who, on the record, sued for the use of Reed, had recovered against Holmes, in the Supreme Court of Pickaway county, for a sum exceeding three hundred dollars. Besides the judgment debts, Robinson owed Holmes some other moneys, and there was a suit in chancery pending between them, in which a master had reported a considerable balance due from Robinson to Holmes. There was no assignment of the debt against Holmes, from Robinson to Reed, but it was in proof that Robinson was indebted to Reed, and that Robinson had agreed with the attorney who held his note to Reed, 91] that *the suit against Holmes should be brought for Reed's use, and the amount, when recovered, applied to the payment of Reed's claim. The motion was adjourned here for decision from the county of Pickaway.

G. W. DOAN, in support of the motion.

J. OLDS, against it.

By the COURT:

The practice of setting off one judgment against another, between the same parties, and due, in the same rights, is ancient and well established. Some of the adjudged cases go upon the principle of extending the statutes of set-off in their spirit of equity and justice. Others hold the exercise of the power, independent of the statutes of set-off, and rest it upon the general jurisdiction of a court over the cause and the parties, when before them. Of the first class of cases, we may cite 3 Wil. 296; 2 Black. 826; 2 Bos. & Pul. 28; 2 Caine, 190. Of the latter, 4 Term, 123; 1 Johns. Ch. 91; 6 Serg. & Rawle, 443; 8 Mass. 451.

But in order to warrant the set-off, it seems to be equally well settled that the actual debts must exist in the same right. This is clearly settled in the cross-cases of Duthy v. Tito and others, Strange, 1203. There were verdicts in both cases for the defendants, and Tito moved to set off the costs, recovered by himself and co-defendants of Duthy, against the costs recovered by Duthy of Tito alone. But his motion was refused. Chancellor Kent considers this the true rule, both at law and in equity. Duncan v.

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Lyon, 3 Johns. Ch. 451; 2 Burr. 1214; 1 Atkins, 237; 2 Merivale, 121.

It is perfectly clear, both from the record and the other proof, that Reed has an interest in the judgment against Holmes. He does not appear before us, nor does it appear that he has had notice of the motion. He may be injuriously affected by a decision on the merits of the motion. This summary mode of exercising the legal or equitable power of the court is not the most proper, when there is an uncertainty as to the rights of parties. 8 Mass. 451. The motion must, therefore, be overruled.

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Judgment is not a lien upon after-acquired lands, aliened by the debtor before levied upon.

THIS case was adjourned here, for decision, from the county of Pickaway. It was an ejectment, and came before the court upon a case agreed. The material facts were these: T. W. Dyott, at June term, 1822, recovered a judgment, in the county of Pickaway, against Henry Nevill, for one thousand and twenty-three dollars and fifty cents. Execution was taken out and levied upon a tract of land containing three hundred and thirty-three and two-third acres, on March 24. 1825. In February, 1829, the undivided two-thirds of said land was sold, on Dyott's execution, to the defendant, for seven dollars sixteen and three-fourths cents per acre. The sale was confirmed, and a deed, in due form, executed by the sheriff to the defendant, who claims under it. On September 4, 1822, Nevill acquired title to this land; on January 27, 1823, Nevill executed a mortgage of the land to the lessors of the plaintiff. On January 4, 1825, a *scire facias* issued upon the mortgage, and a judgment of execution was rendered on January 5, 1825. On August 1, 1826, an execution issued, which was returned, *stayed*. A levy was first made January 1, 1828. On February 21, 1829, the property was sold to the lessors of the plaintiff for seven dollars and seven cents per acre. The sale was confirmed, and a deed executed, in due form, under which the lessors of the plaintiff claim.

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FOLSOM, for the plaintiff.

EWING and DOAN, for defendants.

By the COURT:

The only question submitted, was, whether a lien of a judgment attaches to after-acquired lands, so as to affect the rights of a *bona fide* purchaser. The question now presented for consideration [93] was decided, by this court, in the *case of *Roads v. Symmes*, 1 Ohio, 313; but the confidence of learned counsel in a contrary opinion, has called the court to a more particular examination of the principles involved in that decision.

By the common law, a man could only have satisfaction of the goods, chattels, and present profits of lands. 3 Black. Com. 418. The lands and person were exempt from execution upon feudal principles, which it is not necessary to review. The king, by his prerogative, might have execution of body, goods, and lands; and in an action of debt against an heir, upon an obligation made by his ancestor, the lands descended were liable to execution. 3 Co. 12, a; 1 Bac. Ab. 686. These were the excepted cases at common law. The statute of Westminster 2, (13 Ed. I., c. 18) subjected a moiety; and the same year the statute *de mercatoribus*, all the lands of the debtor to execution. The proceedings under our *fiery facias* have some analogy to those under the first-mentioned statute, although the tenant by *elegit*, and the purchaser at sheriff's sale, hold very different estates. The statute of Westminster 2, is in these words: "When debt is recovered or acknowledged in the king's court, or damages awarded, it shall be from henceforth in the election of him that sued for such debt, or damages, to have a writ of *fiery facias* unto the sheriff, to levy the debt upon the lands and chattels of the debtor (saving only his oxen and beasts of his plow) and one-half of his lands until the debt be levied upon a reasonable price and extent. And if he be put out of the land, he shall recover it again by writ of *novel disseizin*, and after that by writ of *redisseizin*, if need be," Rastal's Statute, 149.

Strange as it may seem, it is very difficult to ascertain the extent given to liens under this statute. The 29 Car. II., c. 3, extended the creditor's right to a moiety of the debtor's land held in trust. Section 15 limits the lien to the day the judgment was entered. Blackstone says, "If the goods are not suffi-

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cient, then the moiety, or one-half of the freehold lands *which he had at the time of the judgment given*, whether held in his own name, or by any other in *trust* for him, is also to be delivered to the plaintiff to hold, till out of the rents and profits thereof the debt be levied, or until defendant's interest be expired." 3 Black. Com. 418. *2 Inst. 395, is cited, which is to the same effect. [94] Many of the English authorities warrant a different conclusion. Roll. 892; Plow. 72. The form of the *elegit* corresponds with the authorities last cited. The command of the writ to the sheriff is, "that without delay you cause to be delivered to the said A., by reasonable price and extent, all the goods and chattels of the said B., on the — day of (*the day the judgment was signed*), the — year of our reign, on which day the judgment was given, was, or at any time since, hath been seized to him, the said A., to hold," etc. Imp. 284. No adjudged case can be found in the English books, so far as opportunity has been allowed for examination, upon the question whether lands acquired subsequent to the judgment, and conveyed before the execution issues, are liable to inquisition under an *elegit*. The Supreme Court of Pennsylvania has traced the authorities to the year books, and conclude it is not settled by any of them. The learned judges examined the case (30 Ed. III. 24), and deny the inference drawn by subsequent elementary writers from it. 6 Bin. 135. The court, however, based their decision, in that case, upon the usages and practices which prevailed in Pennsylvania. The same court in the case, of Richter v. Selim, 8 Serg. & Rawle, 425, appear to consider their former decision an innovation upon the law, and not an improvement; they therefore confine the rule most strictly to the point before decided, and refuse to extend it beyond the letter. Indeed, more than a doubt is expressed of the correctness of the former decision.

In looking further into the American cases, the question still appears nowhere solemnly decided. It has been adjudged in New York, that where the body of the defendant has been taken in execution the lien of the land is suspended; and if, during imprisonment, a *fi. fa.* is issued on a junior judgment, and the land is sold, the purchaser shall hold. 13 Johns. 533. It is also said by Spencer, Judge, in Stow v. Tift, "that it can not be doubted that a judgment will attach on lands, of which the judgment debtor becomes seized, at any time posterior to the judgment; and nothing could prevent a judgment creating a lien on the subse-

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quently acquired lands of the judgment debtor, but the circumstance that his seizin, in the given case, was instantaneous." 15 95] *Johns. 464. The question before the court was, whether a widow could be endowed of lands when the seizin of the husband was but for an instant, and passed from him *eo instanti* he acquired it. The case of *Ridgely v. Gartrill*, 3 Harris & McHen. 449, was this: At May term, 1787, the plaintiff obtained a judgment against G. Burgess, for the debt, etc., which was not paid. At the time the judgment was rendered, Burgess was seized in fee of a tract of land of more value than would satisfy the judgment. In 1791, Brown's executors obtained a judgment for a hundred pounds, and costs. In 1792 a *fi. fa.* issued, by virtue of which the sheriff sold the land to the defendant, who paid the money and obtained the deed. This was a *scire facias* to the defendant, as terre-tenant, to make the land answer to the plaintiff's judgment. The report furnishes no argument, or reference to authorities, or even to the statutes of Maryland. The reporter says, "the court gave judgment for the plaintiff upon the statement of facts." Upon a careful examination of all the authorities within our reach, the point under consideration does not appear to have been solemnly adjudged, upon full investigation, either in England or in our own country, except in Pennsylvania. Our researches have furnished but little light upon the question, and it seems not much less distinct in the mists of antiquity than in our own day. We would appear, then, to violate no settled principle, in analogous cases, by giving to our statute the construction which our circumstances and policy require. With us, the judgment creditor's lien upon the debtor's land, the right to sue, and the manner of transferring to the purchaser, are all matters of statutory regulation. The statute declares that "the lands and tenements of the debtor shall be bound for the satisfaction of any judgment against such debtor, from the first day of the term at which judgment shall be rendered." The writ of *feri facias* "shall command the officer to whom it is directed, that of the goods and chattels of the debtor, he cause to be made the moneys specified in the writ; and for want of goods and chattels, he cause the same to be made of the lands and tenements of the debtor." It is provided in section 11 of the same act, "that the sheriff, or other officer, who, by such writ, or writs of execution, shall sell the said lands 96] and tenements so *levied upon, or any part thereof, shall

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make to the purchaser or purchasers as good and sufficient a deed of conveyance for the lands and tenements so sold as the person or persons, against whom such writ or writs of execution were issued, might or could have made for the same, at any time after said lands become liable to said judgment, which deed shall be *prima facie* evidence of the legality of such sale, and the proceedings thereon, until the contrary be proved, and shall vest in the purchaser as good and as perfect an estate, in the premises therein mentioned, as was vested in the party, at or after the time when the said lands and tenements became liable to the satisfaction of the said judges." 22 Ohio L. 108. The legislature, in giving judgments on a lien, had particularly in view the lands that the debtor held at the time when the judgment was rendered. They clearly intended the judgment should attach to these, so that a purchaser would hold them *cum onere*. The execution, according to its command, was not only intended to embrace lands upon which the judgment was a lien, but those held by the debtor at the time the execution was issued and a levy made. The command of the *fi. fa.* certainly does not embrace, in terms or literally, the lands acquired at any time posterior to the judgment, but which had been aliened before the execution issued. Such can not, with strict propriety, be said to be the "lands of the debtor." They were not the lands of the debtor, and, therefore, not "bound by the judgment." The deed of conveyance shall be as good and sufficient as the debtor could have made at any time after the said lands became liable to the said judgment. According to our construction, the lands held by the debtor, when the judgment was rendered, as well as the lands held at the time of issuing the execution, are "liable to judgment," and to "the satisfaction of the judgment." The legislature has defined more explicitly the deed of the sheriff, and the effect of it. In giving the lien of the judgment, in the command of the *feri facias*, in the definition of the sheriff's deed, and in declaring its effect, the legislature has guarded the terms employed in the most cautious manner, to save lands of the debtor, purchased after the judgment, and aliened before execution. This inference is most strongly deduced from the command of the *feri facias*. If we are to arrive at the law of the court *from the form of the *elegit*, we may surely, with [97 equal propriety, infer the intention of the legislature, from the command of the *feri facias*, as given in the statute. It is a mat-

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ter of history that this law was drafted by learned counsel, appointed as a committee of revision, who were undoubtedly exactly acquainted with the form of the *elegit*. We can not but presume many members of the legislature, who passed it, were intimately acquainted with the common and statute law touching executions. It must have been well known that the *elegit*, in form, extended itself to a moiety of all lands of the debtor, held at the date of the judgment, or of which *he had been seized at any time since*. If such had been the intension of the legislature, they would have framed their execution accordingly. For the satisfaction of the execution, those are the lands of the debtor which are bound by the judgment, as well as those afterward acquired, but not conveyed. The terms in which this construction is expressed, are without ambiguity, and do not require analogies to render them satisfactory. But this point has been put to rest in the case of *Roads v. Symmes*. When a rule of construction has been adopted, upon which titles to real estate depend, it would lead to great inconvenience, if not injustice, to alter it. That decision may have been an innovation upon established principles of law—it may have been a departure from true policy, under the circumstances in which we are placed—but it would be a more dangerous innovation, and a wider departure from true policy *now* to disturb it. 2 Cran. 22; 1 Ohio, 1.

Judgment for the plaintiff.

98] *THOMAS STEWART AND JONATHAN CHAPLINE v. TREASURER OF CHAMPAIGN COUNTY, FOR USE OF JOHN McADAMS.

A *devastavit* by an administrator can not be suggested and proved, in a suit on administrator's bond, against the administrator and his securities.

THIS was a writ of error to a judgment of the court of common pleas, rendered against the plaintiff in error, in favor of the defendant in error. It was an action of debt brought upon an administration bond, the defendants being securities, and the writ, as against the administrators, being returned not found.

The declaration set out the granting of administration, and the execution of the bond. It then averred a judgment in favor of McAdams against the administrators, and that assets to a certain

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amount had come to their hands, which they had wasted; but it contained no averment that any execution had issued on the judgment of the plaintiff against the administrators, or of any adjudication that they had wasted the assets. Judgment was rendered in the common pleas against the plaintiffs in error by default, to reverse which the writ of error was brought.

The errors assigned were:

1. That the record did not show that a *devastavit* had been established by action, or otherwise.
2. That it did not appear that any execution had been sued on the plaintiff's judgment against the administrators, before the commencement of this suit.
3. That the judgment was founded on a *devastavit*, and the record did not show that any *devastavit* was found by the court, the inquisition of a jury, or otherwise.
4. The general error.

MASON, for plaintiff.

ANTHONY, for defendant.

By the COURT:

The principal question to be decided in this case is, whether, in an action upon an administrator's bond, brought against the administrator and his securities, the fact of a **devastavit* by [99] the administrator can properly be put in issue and tried and determined. The statute 1 Hen. VIII., c. 5, directed the taking of surety for the true administration of goods, chattels, and debts. The statute of 22 and 23 Car. II., c. 10, commonly called the statute of distribution, declares "that all ordinaries and ecclesiastical judges, upon granting administration, shall take a bond of the administrator with two or more sureties, with condition that the administrator shall make a true and perfect inventory of all the goods and chattels of the deceased, and exhibit it unto the registry of the ordinary's court, by such a day, and to administer according to law; and to make a true and just account thereof; and to make distribution of the surplus." Under these statutes, much difficulty was experienced by the English courts in settling an uniform mode of establishing a *devastavit*.

Anciently, if the sheriff returned *nulla bona*, and also a *devastavit*

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to a *feri facias de bonis testatoris*, sued out upon a judgment obtained against an executor, it was sometimes the practice to sue out a *capias ad satisfaciendum* against the executor. Several other methods were devised, which need not be enumerated, as they have long since fallen into disuse. The practice in the common pleas was, upon suggestion, in the special writ of *fera facias* of a *devastavit*, to direct the sheriff to inquire, by jury, whether the executor had wasted the goods, and if the jury found he had, then a *scire facias* was issued against him, and unless he made a good defense thereto, execution was awarded, *de bonis propriis*. It afterward became the practice of both courts to incorporate the *feri facias* inquiry and the *scire facias* into one writ called a *scire fieri inquiry*. This writ recites the *feri facias de bonis testatoris*, the return of *nulla bona* by the sheriff, and then, suggesting that the executor had sold and converted the goods of the testator to the value of the debts, commands the sheriff to levy the debt, etc., of the goods, etc., of the testator, in the hand of the executor, if they could be levied thereof; but if it should appear to him by the inquisition of a jury, that the executor had wasted the goods, then the sheriff is to warn the executor to appear, etc. This practice is still frequently adopted.

100] *But the most usual mode of proceeding is by action on the judgment, suggesting a *devastavit*. 1 Saund. 219, n. 8. A *feri facias* is first sued out, and upon the sheriff's return of *nulla bona*, an action is commenced on the judgment, stating the judgment, the writ of *feri facias*, and the sheriff's return; and on the trial, the record, the writ, and return will be sufficient evidence to prove the case. And the action may be brought upon a bare suggestion of *devastavit*, without any writ of *feri facias* first taken out. 1 Saund., n. 8, cited; *Wheatly v. Lowe*, 1 Sid. 397. These modes of establishing a *devastavit* are well settled by the English practice. So far as can be discovered, no attempt has been made to fix a *devastavit* upon an administrator, by making a suggestion, in the suit against him and his securities, *upon their bond*. The administrator may traverse the inquisition as well as the return, and is entitled to the same defense. *Gibson v. Brook Croke* Eliz 859. It can not be disputed that this has been treated as a matter of practice, under the control of the court, as to which they can establish their own rules. 4 Conn. 445. The practice adopted in this country appears uniformly to be an action upon the judgment, suggesting a *devastavit*. 3 Hen.

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& Munf. 123; 4 Munf. 466; 1 McCord, 76; 4 Conn. 445; 4 Bibb, 83. The practice, so far as can be ascertained in this state, is to sue upon the judgment making the suggestion. It is probable the provisions of our statute would make a difference in some instances, in the evidence on trial. During the time limited by the court for the settlement of estates, no execution can be issued upon a judgment rendered against an administrator. We are not, however, in this case, to determine what shall be *evidence* of a *devastavit*, under the provisions of our statute. By section 5 of the act "defining the duties of executors and administrators," it is provided that the court shall require the administrator to give bond, with two or more sufficient securities, conditioned for the faithful performance of the duties required of him by law. Section 11 declares that a refusal or neglect to settle up the estate shall be deemed a breach of the bond of the administrator. It is probable this was useless legislation, for one of the duties the law requires of the administrator is to adjust and settle up *his accounts, within eighteen [101 months from the date of his letters, unless the court shall extend the time.

If the non-performance of any duty, which the statute requires of an administrator, could be assigned as the breach of the condition of his bond, it is clear that this might, upon general principles, without any declaratory act. This cause was treated at bar as if the whole remedy, upon the bond against an administrator and his security, depended upon establishing or suggesting a *devastavit*.

It is not necessary now to decide whether the condition of an administrator's bond was only intended to protect heirs and creditors against a single malfeasance. The condition would, indeed, appear to secure the performance of every duty which the law enjoins on an administrator. Nor can this view of the subject disturb the authority of *Treasurer of Pickaway County v. Hall*, 3 Ohio, 225. That was an action on the bond of the administratrix, and the principal breach assigned was "that she had neglected and refused, though often requested, and demanded particularly on March 30, 1827, to pay the said Nicholas and Rebecca," for whose use the action was brought, "said Rebecca being one of the heirs of Joseph Glase, deceased, the proportion of moneys before that time, come to the hands of the administratrix, to which said Rebecca, as heir at law, was entitled."

The court say, "If the plaintiff claims as heir, he must show

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how he makes himself so, that his right may judicially appear to the court, and the proportion due to him be ascertained." Again: "It is much the safer doctrine to require proceedings, first, against the administrator himself, and only allow resort to the surety, when nothing is to be contested but the question of payment." The questions considered by the court were: 1. Whether, in the declaration, the plaintiff had showed herself, with sufficient certainty, to be heir to the intestate. 2. Whether, admitting she was heir, she could sue upon the bond as distributee before settlement, and her proportion had been ascertained. The court never could have intended to be understood as deciding that no breach of the condition of the bond could be assigned, except non-payment to the distributees, nor that the bond could not be forfeited, so as to 102] charge the securities, until *final settlement. The legislature, without doubt, intended this bond as a security, not only for the heir, but for the creditors, and indeed all interested in a just administration of the estate. But this is aside from the consideration whether *devastavit* can be assigned in a suit upon the bond of the administrator. A creditor shall not take an assignment of the bond and sue it, and assign for breach the non-payment of debt as to him, or *devastavit* committed by the administrator, for that would be needless and indefinite. *Archbishop of Canterbury v. Wells* 1, Salk, 315. The first proposition in this decision has been questioned, 13, Johns. 437; but it has received the sanction of the Supreme Court of Massachusetts, 9 Mass. 114; and so far as an authority upon the question under consideration, has never (that can be discovered), been doubted. In the case of the *People v. Dunlap*, the Supreme Court of New York do not expressly decide that *devastavit* may be suggested, upon a suit on the bond of the administrator; but rather seemed to permit the recovery, upon the ground, that the suggestion, under the statute, amounted to an assignment of a breach of the condition. The cases cited by that court are 1 Wash. 31, and 9 Mass. 114. If the object in citing these authorities was to maintain the proposition, that in a suit on the administrator's bond a *devastavit* might be suggested, they furnish no authority to support it. In neither of those cases is there any such suggestion. The wasting of the estate is in itself a tort. It is contrary to the oath of the administrator, and the trust and confidence reposed in him. To the suggestion on the inquisition, not guilty, may be pleaded. It is like a criminal prosecution.

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1 Wash. 31. It would present a strange anomaly to join a security, whose liability arose from contract merely, with a principal charged in an action *ex delicto*! Whether we look to precedent and authorities, or the reason of the thing, the conclusion is forced upon us that a *devastavit* can not be established in a suit against the administrator and his securities upon the official bond. How a *devastavit* shall be fixed, and how far the securities under our statute shall be liable for such mifeasance, must be left open for consideration. The question on the record is, whether a *devastavit* can be first established upon the suit against the administrator and his securities; and we are clearly of *opinion it can [103] not, and that such practice would be warranted by no authority. The conclusions of the court will be found supported by the following authorities: 1 Salk. 315; Camp. 140; 3 Atk. 248; 1 Munf. 1; 1 Wash. 31; 9 Mass. 114; 1 Marsh. 488; 2 Bibb, 292; 13 Johns. 443; 1 Bay, 328; 1 McCord, 76. In these various authorities, with the exception of 13 Johns. 443, we find no suggestion of *devastavit* in the declaration upon an administrator's bond, nor is a question made of the liability of the administrator and his securities upon a breach of the condition. Upon the first error assigned, the judgment of the court below must be reversed. No argument was furnished on either side.

DANIEL B. BUSH AND OTHERS v. WILLIAM CRITCHFIELD AND OTHERS.

Where persons covenant as sureties, that their principal shall sell and account for all merchandise placed in his hands, within a stated period, it is not necessary to aver notice to the securities of a failure, in an action on the covenant.

THIS was an action of covenant, adjourned here for decision from the county of Knox. The declaration contained two counts upon the same covenant. The second count stated, that on June 27, 1825, the defendants covenanted with the plaintiffs, in consideration that the plaintiffs would supply one D. B. McConnel with merchandise to sell on commission, at such per cent. as the plaintiffs and McConnel might, or had agreed upon; that the said de-

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fendants would hold themselves responsible for the faithful and honest performance of said McConnell, for one year from that date, and as much longer as said McConnell should be justified in the sight of the plaintiffs and defendants; and that said McConnell should render a true and just account of all merchandise so delivered by the plaintiffs to him, and of sales made of such goods by him, as often as the plaintiffs should call for such account. The defendants further covenanted that McConnell should, faithfully and honestly, fulfill all that he had engaged, by an article with the plaintiffs, dated April 18, 1825, and that the defendants would be bound for the merchandise delivered under said article, as if [104] *they had formerly been bound with their co-defendants and others, for the same, for the faithful performance of the same; which article of April 18, 1825, is then recited in the declaration, containing various stipulations for selling and accounting for merchandise, and for articles received in barter for the same, at an allowance of fifteen per cent. upon proceeds of sales. The declaration then avers, that on June 28, 1825, plaintiffs delivered a large amount of merchandise to McConnell, to be sold on commission, under the contract. It then avers that McConnell did not, for one year from June 27, 1825, "honestly and faithfully account with and pay to the said plaintiffs the money for which said McConnell sold the said goods, wares, and merchandise; but, on the contrary thereof, said McConnell, within one year from June 27, 1825, sold a large quantity of the said merchandise, and received for the same a large sum of money, to wit, the sum of eighteen hundred dollars, which he neglected and refused to pay," etc., assigning various other breaches, under the contract of June 27, 1825, as including the contract of April 18, 1825, concluding with an averment that McConnell had failed to comply with the terms of the contract, "although said plaintiffs afterward, to wit, on April 17, 1828, at — county aforesaid, and within one year from June 27, 1825, called on said McConnell for that purpose." The declaration contains no averment that the defendants had notice of any failure alleged in the declaration.

The defendants pleaded, *first*, that they had performed their covenants.

Second. That on April 17, 1826, McConnell settled and accounted with the plaintiffs for all the goods delivered, and for the profits of sales, and generally of all matters arising on the contract, and

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delivered to them goods and merchandise of the value of fifteen hundred dollars, and gave separate promissory notes for sums specified to individuals named by mutual agreement between the plaintiffs and McConnel, in full satisfaction of the whole contract, and for the merchandise delivered by plaintiffs to McConnel, and for the profits arising on the sale.

The plaintiffs joined issue on the plea of general performance. And to the special plea, they also replied, negating *the [105 allegations of the plea, and concluded by tendering an issue to the country. To this replication the defendants demurred.

H. STANBERRY, for plaintiff.

T. EWING, for defendants.

By the COURT:

It is a general rule, that where a matter does not lie more properly in the knowledge of one of the parties than the other, notice is not requisite; therefore, if a man is bound, by obligation of covenant, or promises to do a thing, on the performance of an act by a stranger, notice need not be alleged, for it lies in the defendant's knowledge, as much as the plaintiff's, and he ought to take notice at his peril. 2 Saund. 62, n. 4; 2 Chit. 81; 11 Johns. 61.

The defendants have covenanted, in general terms, to hold themselves accountable for the fidelity of McConnel, and that he should render a true account for one year; and if it had been the intention of parties, that the obligors should have notice, that should have been inserted in the condition. A party who covenants generally, to do a particular thing, is bound at all events. Duffield v. Scott, et al., 3 Johns. 374. The plaintiffs had less to do with the supervision of McConnel's conduct than the defendants; nor had they any better means of ascertaining that he was converting the proceeds of the goods to his own use. The plaintiffs did not reserve the power of visitation, nor did they covenant to notify the defendants of McConnel's mode of transacting the business. The defendant, in consideration of a ruff-band delivered to him, promised to pay to him, on the day of the plaintiff's marriage, three pounds, and alleged he was married such a day, yet although often requested he had not paid. There was a judgment of *nihil dicit* and inquiry. A motion was made in arrest of judgment, because

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there could be no breach of promise unless notice was given of the plaintiff's marriage; but Hutton, Harvey, and Yelverton adjudged it to be good enough, for the defendant, at his peril, ought to take notice, and the plaintiff need not show he gave notice 106] *of the marriage. Croke Car. 34. In the case of *Norris et al. v. Powell*, 14 East, 510, a bond had been taken by the commissioners of the land tax for the fidelity of a collector. It was objected that no notice had been given to the surety, of the collector's default, nor demand of payment made, until after the principal had been discharged for misconduct; but both points were overruled by the court. Fell on Guaranties, 224. The defendants do not assume the position, that there is any express covenant to give notice, or even covenant in law to do it; but rather place their case upon principles of commercial law. But certainly there is no just analogy between principles and surety in a bond, and the drawer and indorser of a bill of exchange, so far as legal principles fix their liabilities. The liability of an indorser is conditional, and entirely arbitrary. His undertaking is conditional, that he will be holden, upon demand and refusal of the drawer, and notice of those facts. This condition, though not expressed, is of the essence of the contract. There is no such contract implied in sealed instruments. If parties wish to have and give notice, they must so covenant, and then the non-performance might be assigned as a breach. As this instrument stands, there is no express covenant to give notice to the defendants of McConnell's default, nor are the covenants such as to raise any in law. From the nature of the covenants, the defendants were bound, at their peril, to take notice of the breaches.

Demurrer to the replication overruled, and costs taxed to the defendants since filing, and the cause continued for inquiry of damages.

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*HENRY RAGUET v. DAVID WADE.

Law authorizing tax upon merchants not unconstitutional.

RESERVED from Hamilton county.

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The declaration is for taking and carrying away goods, etc., of the plaintiff to the value of five hundred dollars.

The defendant pleads, *first*, the general issue.

Second. That the defendant was treasurer of the county of Hamilton, and as such was authorized by law to collect all taxes assessed by and under the authority of the State of Ohio within said county. That at the time of seizing and taking said goods the plaintiff was a merchant, selling goods, wares, and merchandise, within said county, and was subject to pay a tax upon his capital employed, etc., and being so subject was taxed in the sum of — dollars, under and by virtue of the laws aforesaid; and said tax being so laid and assessed, was placed in the defendant's hands, as treasurer, to collect; and the plaintiff wholly neglecting and refusing to pay the same, defendant entered, etc., and took, etc., and disposed of said goods according to law, which is the same, etc.

The plaintiff replies that his capital was employed in importing into this state from other states, and that he was vending, by wholesale and retail, divers, etc., the growth, etc., of foreign countries and other states, etc., and he, the plaintiff, imported direct from said states, in bulk and in packages, put up by the manufacturer, none of which, by law, were the subject of taxation by the state authority, etc.

To this replication there is a general demurrer and joinder. The question submitted was, whether the law of the state, imposing a tax upon the capital employed by merchants is constitutional.

HAMMOND, for plaintiff.

WADE, for defendant.

Opinion of the court, by Judge SWAN:

This presents an inquiry of acknowledged delicacy, concerning the constitutional powers of the general and state *govern- [103] ments. The question is deeply interesting to this state, as her citizens must depend upon this general legislative authority for the preservation of their faith and the completion of the public works they have undertaken. It is imposing, as it involves the exercise of sovereign power. The acts of the legislature, supposed to be in conflict with the constitution and laws of the United

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States, were passed February 3, 1825, and January 17, 1826, and, so far as concerns the present inquiry, are in these words: "All persons trading in foreign or domestic goods, wares and merchandise, or drugs and medicines, within this state, whether the capital employed in such trade shall be owned within the state or elsewhere, shall be considered merchants, and as such shall be classed according to the amount of annual capital by them respectively employed." The act of January 17, 1826, is exactly in the same words, except "they are to be entered on the general list of taxation, and as such shall be assessed according to the amount of capital by such merchants respectively employed," etc. This is a part of an equitable system of taxation, adopted to meet the disbursements for canals, as well as to defray the general expenses of the government. The right of taxing capital employed in merchandise, of licensing tavern-keepers to vend foreign and domestic liquors, and of regulating retailers, peddlers, and brokers, has been exercised without question as to its constitutional existence from the foundation of the state government. Whatever, then, may be the effect, it would be unjust to impute to the legislature any intentional invasion of the laws of Congress, or the constitution of the United States.

The plaintiff insists that these acts of the legislature are repugnant to article 1, section 10, of the constitution of the United States, which declares that no state shall, without the consent of Congress, lay any imposts or duties on imports or exports, except what may be absolutely necessary for executing its inspection laws; and also to article 1, section 8, which says Congress shall have power "to regulate commerce with foreign nations, and among the several states, and with the Indian tribes."

The powers of the general and state governments, under these 109] clauses of the constitution, have been so often and so ably discussed, and the principles so profoundly considered by the Supreme Court of the United States, that nearly the whole grounds have been occupied, and but little remains for us other than the application of those principles as settled to the case presented by the pleadings. The powers of the different governments under article 1, section 10, of the constitution, are very candidly and ably examined in the thirty-second number of the Federalist, by Mr. Hamilton. This fair and profound commentary upon the constitution has deserved and received the approbation of the highest

judicial tribunal in the nation. The power of the states to impose taxes on all articles other than exports or imports, is there contended to be "manifestly a concurrent and co-equal authority," etc. There is plainly no expression in the granting clause which makes that power exclusive in the Union. There is no independent clause or sentence which prohibits the states from exercising it. So far is this from being the case, that a plain and conclusive argument to the contrary is deducible from the restraint laid upon the states in relation to the duties on imports and exports. This restriction implies an admission, that if it were not inserted the states would possess the power it excludes; and it implies a further admission, that as to all other taxes the authority of the states remains undiminished. In any other view it would be both unnecessary and dangerous. It would be unnecessary, because if the grant to the Union of the power of laying those duties implied the exclusion of the states, or even their subordination in this particular, there could be no need of such restriction; it would be dangerous, because the introduction of it leads directly to the conclusion which has been mentioned, and which, if the reasoning of the objectors be just, could not have been intended. I mean that the states, in all cases to which the restriction did not apply, would have a concurrent power of taxing with the Union. In the case of *Sturges v. Crowninshield*, 4 Wheat. 122, one of the principles recognized was, that the mere grant of a power to Congress did not imply a prohibition on the states to exercise the same power; but wherever the terms in which a power is granted to Congress, or the nature of the power, required that it should be exercised exclusively by Congress, the subject is as completely taken from the state legislatures as if they had been expressly forbidden [110] to act upon it. This leaves a class of cases in which the general and state governments have co-ordinate and concurrent powers of legislation. The states were, therefore, not forbidden to pass bankrupt laws, provided they should contain no principle which would violate section 10, of article 1, of the constitution of the United States.

In the case of *Gibbons v. Ogden*, 9 Wheaton, 1, it was decided that the power to regulate commerce was the power to prescribe the rule by which commerce was to be governed; that it was complete in itself; might be exercised to its utmost extent, and had no limitations other than those prescribed in the constitution. But

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the court say, "The grant of the power to lay and collect taxes, is like the power to regulate commerce made in general terms, and has never been understood to interfere with the exercise of the same power by the states, etc. The power of taxation is indispensable to their existence, and is a power which, in its own nature, is capable of residing in, and being exercised by, different authorities at the same time"—p. 199. The co-ordinate authority seems a necessary result of the division of sovereign power. The self-preservation of both governments requires the exercise of the taxing power; and it seems admitted by the whole tenor of the constitution. The principle appears established beyond controversy, that the states can tax all articles concurrently with the general government, except imports and exports, or where it will interfere with the power of Congress to regulate commerce. The case of *Brown and others v. The State of Maryland*, 12 Wheat. 419, is supposed by the plaintiff to be an authority exactly in his favor; and that the principles decided require this court to pronounce the law under consideration unconstitutional and void. The law of Maryland required "importers of foreign articles or commodities, of dry goods, wares, or merchandise, by bulk or package, etc., and other persons selling the same by wholesale, bale, or package, etc., before they were authorized to sell, to take out a license, etc., for which they should pay fifty dollars." "The penalty and forfeiture were the amount of the license, and one hundred dollars to be recovered by indictment. The provisions of this law were held to [111] be in conflict with the powers vested in the *Congress by the United States, as well as that article of the constitution which inhibits a state from laying any duties upon imports. The court held the principle to be sound, that a grant to import included a power to sell, subject to some limitation, and that the article imported, as well as the importer, were constitutionally protected from local legislation. "Any penalty," says the court, "inflicted on the importer, for selling the article in his character of importer, must be in opposition to the act of Congress which authorizes importation. Any charge on the introduction and incorporation of the articles into, and with the mass of property in the country, must be hostile to the powers given to Congress to regulate commerce, since an essential part of that regulation, and the principal object of it, is to prescribe the regular means of accomplishing that introduction and incorporation." The powers of a state to tax its

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own citizens, or their property within its jurisdiction, are admitted to be sacred; but these can not be exercised so as to obstruct the operations of an act of Congress, or defeat their constitutional right to regulate commerce. The correctness of these views is evident from the whole tenor of the instrument, which establishes the fundamental principles of the government, and from the very nature of our complex system: Without a recognition of them, the portions of sovereignty which have been given and retained by the general and state governments could not exist. The one or the other would sink for want of support, and a consolidation or separation would be the necessary result. The powers of the governments approach each other, until they are only separated by delicate shades and almost imperceptible gradations. It is difficult to trace with certainty, but yet it is hoped not impossible, the line that separates the constitutional powers of the general and state governments. The constitution has not, in all cases, exactly marked the termination of the one nor the commencement of the other. Perhaps no skill in the science of government could, in all cases, fix the line of limitation. We have it from the highest judicial authority, that should the general and state governments, in the exercise of their powers, come in conflict, "that which is not supreme must yield to that which is supreme." The Supreme Court of the United States felt and acknowledged the difficulty of establishing a rule universal *in its application, [112 a rule which should fix the boundary between the constitutional powers of the general and state governments, upon the subject of taxation. They have not determined the exact point where the operations of the grant to the importer shall cease, upon the articles imported, to protect them from state imposition.

A rule, however, is suggested, and applied more than once in the decision of the court, which, with great deference, is deemed too vague and indefinite, even for practical purposes, and can not be adopted as a guide in judicial determinations. It is this, "when the importer has so acted upon the thing imported, that it has become incorporated and mixed up with the mass of property in the country, it has, perhaps, lost its distinctive character as an import, and has become subject to the taxing power of the state." This rule seems to have been suggested from that similar principle, that if one mingle his money with another's, so that the proportions can not be distinguished in the mass, the other shall have

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the whole. In some states, and respecting some articles, this rule might operate with justness and propriety; but by far the greater proportion of foreign commodities, and those from other states, are never mixed with the mass of property so as to lose their identity. This is peculiarly the case in the agricultural states. The stock of our merchants consists, almost exclusively, of articles from other states and countries, which can as well be discovered singly as in packages, bales, or trunks. The brandy of France, or the wine of Germany or Spain, can be as easily distinguished in bottles as in pipos. It would seem a task not much less difficult, to discover what should be considered an incorporation, and mixing up of property, so as to admit the laying of a tax upon the articles by the state, as it was before to find the limits of local legislation, under the constitution. The power of taxing property within its jurisdiction by a state, although the same has been subjected to imposts by the laws of the United States, seems never to have been directly denied by the bar or court. Its exercise, after the right acquired under the laws of the general government has ceased, is required by principles of self-preservation, and is acknowledged to be consistent with a correct construction of the constitution. The difficulty is not in the power, but in the [113] extent of its application, so as not to come in collision with the co-ordinate authority of the general government. It is conceded that the revenue arising from foreign commerce belongs exclusively to the United States, as well as the power to regulate intercourse with foreign nations. The law of a state which would interfere with either would be unconstitutional and void. The right to make their own regulations concerning them is essential to the existence of the federal government, and the constitution has declared it in terms which leaves little to be supplied by inference or implication. If the acts of the legislature, under consideration, came in conflict with the powers of Congress to lay duties upon imports, to regulate commerce with foreign nations and among the states, or any other secured by the constitution, the court, without hesitation, would declare them inoperative and void.

The laws in question impose a tax upon the capital of merchants, without any discrimination between wholesale and retail dealers, except the classes would make such discrimination. This tax can not be admitted to come within the idea of a duty upon imports, nor can it be discovered that its operations can interfere with the

powers of Congress to regulate commerce. It is purely a police regulation, affecting the consumer alone. The amount of tax upon the capital thus employed bears a just proportion to that assessed upon land and almost every species of property within the state. It can no more affect importations or interfere with commercial regulations by the United States than a tax upon land or bullocks could be deemed a duty upon exports. The state power to tax must be taken with the limitation only that it be not an impost, or duty upon imports or exports, and that it does not conflict with the powers of Congress to regulate commerce.

It is, with these exceptions, an unlimited, sovereign power. The legitimate exercise of this authority is one thing; the abuse of it is a different question. If a state, in a fit of political phrensy, should lose sight of its duty, as a constituent part of the general government, and levy a tax upon the capital of merchants, so as to amount to a prohibition of foreign commodities, and destroy the revenue of the general government, this would be most clearly an interference with the powers of Congress to regulate commerce, [114 and such a law would not only be repugnant to the principles of the constitution, but void, on the grounds that it would be a manifest act of tyranny and oppression.

This is not, however, the character of the tax under consideration, nor has it the remotest tendency to bring about such a result. So, an insupportable tax upon bullocks, or the land upon which they must be grazed, may be imposed by a state so as wholly to prevent the exportation of beef. This possible abuse of power ought not to furnish a constitutional objection to its being exercised in a just and reasonable manner, for the legitimate ends and objects of the local governments, and the maintenance of that part of the sovereign power with which they are intrusted by the constitution. When such unjust and oppressive measures shall be adopted in state legislation, as their powers are not supreme, "they must yield to that which is supreme." The highest judicial tribunal in the Union must determine this, and they will fearlessly determine it, when such a law of the state shall be presented. The judicial department of the government, as cases arise, must determine the line between the municipal powers of the states, and the commercial powers of the Union.

No doubt the limited powers of the states may have occasionally, through inadvertence, or temporary popular excitement, been

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transcended in legislation ; but the power exists with the judiciary to prevent the effects of these dangerous collisions, and it is on the exercise, the independent and fearless exercise, of this power, that the government *has depended* for its continuance, and *must depend* for its perpetuity. To pronounce these laws unconstitutional, because by possibility they may, in some very remote degree, affect importations, or the operations of commerce, would be to yield the principle that a state has not a right to tax property within its jurisdiction for its own support. It would be surrendering the portion of sovereignty reserved at the formation of the constitution, and acquiescing in becoming a consolidated government. These laws impose no impost or duty upon imports. The tax is upon capital, just and equitable, upon abstract principles ; indispensably necessary to be laid for the credit, faith, and interest of 115] the state; conflicting with no *provision of the constitution or law of Congress ; and interfering with no power to regulate commerce, either foreign or among the states. It is believed these views do not oppose any principle decided by the Supreme Court of the United States, but, on the contrary, are sanctioned by the general admissions and reasons, where similar points have been under discussion and consideration. To preserve the balance between the powers of the general and state governments, the end and object of both must be kept in view. Mist, if not darkness, is upon the line which marks the division of the sovereign power.

The rights of both must depend upon the patriotism and good sense of the citizens, and the mutual forbearance of their agents, as much as upon any distinct, visible constitutional boundary.

The demurrer is sustained.

LESSEE OF C. SMITH AND OTHERS v. GEORGE W. JONES.

A will, made in May, 1811, operated as a devise of a lot, which the deviser was in possession of, at the time of making the will, on a verbal contract of purchase, and for which he subsequently took a deed in his lifetime.

THIS was a motion for a new trial, in an action of ejectment, the jury having, under the instruction of the court, returned a verdict

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for the defendant. The case was this: The lessors of the plaintiff claimed, as heirs at law to their father, a lot in Cincinnati, conveyed to him by Joel Williams, on May 26, 1812. The defendants claimed, under a will duly executed, dated July 25, 1811. The defendant also gave evidence that the testator, Smith, was in possession of the lot, under a verbal contract of purchase, and commenced improvements upon it anterior to July, 1811, the date of the will. It was also in proof, that on September 9, 1811, the testator entered into a written agreement with Joel Williams for the purchase of the lot, in completion of which the deed was subsequently made.

The court instructed the jury that if they were satisfied, from the proof, that the testator was in possession, under a verbal contract of purchase, at the time of making the will, the devise was operative, and the defendant entitled to a *verdict. Under [116 this instruction the jury found for the defendant, adding that they found that the testator was in possession, upon a verbal contract of purchase, when the will was made. The motion for a new trial was made on the ground that the court erred in the instruction given, and the decision of this motion was adjourned here by the Supreme Court in Hamilton county.

BENHAM and FINLEY, for plaintiff:

Two points arise out of this case: 1. Whether a devise of the testator's real estate, which he holds by verbal contract merely, at the time of executing his will, is valid?

2. If the will does operate to pass lands, held merely by parol contract, and subsequently to executing the will the testator acquires legal title to the premises, and dies, does the *legal title* pass to the devisee, or does it descend to the heir at law, in trust for the devisee?

As to the first point, it is a well-settled principle, that the deviser should be seized in fee at *the time of making his will*. Rep. 246. If, therefore, the testator demise all his lands, and afterward purchase other lands, and die without making a new will, or republishing his former will, such after-purchased lands will not pass; and this rule is so rigid that a devise will not pass lands specifically mentioned in it, and intended to be devised. Roberts on Wills, 227; 9 Johns. 312; 3 Johns. Ch. 307, 362; 5 Munf. 272, 342; 8 Cranch, 66. In the case of *Arthur v. Bokenham*, Rep. 750,

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Lord Chief Justice Trevor lays down the doctrine in the broadest terms, that if the deviser was not owner of the land when the will was made it did not pass.

In the case of Harwood, Coup. 90, it is laid down "that a devise is an appointment of particular lands to a particular devisee, and is considered as being in the nature of a conveyance, by way of appointment; upon which principle it is, that no man can devise lands which he has not at the date of such conveyance; and this principle does not turn upon the construction of the statute of Henry VIII., which says "that any person having lands, etc., may devise, for the same rule held before the statute, where lands were devisable by custom. It is upon the same principle there have 117] been revocations determined contrary to the intent of the testator." The case of Acale v. Roberts, 3 Burr. 1457, recognizes the same principles.

The testator in the present case having a mere naked possession of the premises at the time of making his will, had no title, either in law or equity, on which the devise could operate, for it can not be contended that a mere verbal contract for lands confers any title, even if the grantee should take possession under such contract, unless he should have made extensive improvements, paid the purchase money, etc., which does not appear from the verdict to have been the case; nor was it necessary according to the charge of the court they should so find.

The testator having subsequently to the demise, article to purchase the premises, and then acquired the legal title, can not extend the demise back by relation to embrace the land; because *relation* never operates to make an act good which was void for defect of power. Vent. 304; 3 Rep. 29.

It is admitted that when lands contracted for are devised, such devise will be held good in equity. But there must be express articles, or a positive agreement, binding within the statute of frauds, entered into and completed before the execution of the will; otherwise the estate will not pass. Longford v. Pitt, 2 P. Wms.

But it is contended by the defendant that, by the statute in force at the time of making the will, the land passed by it, although acquired subsequent to its execution. The statute then in force was taken from the Virginia code, and authorized every person aged twenty-one years, etc., "at his will and pleasure, by last will

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and testament in writing, to devise all the estate, right, title, and interest in possession, reversion, or remainder, which he hath, or at the time of his death shall have, of, in, or to lands," etc. But in order that lands acquired after the date of the will may pass by it under this statute, it is necessary that the intention of the testator to pass them should clearly appear on the face of the will. 3 V. C. 66. The court in that case say, "that the rule in England, as well as Virginia, at the time of the passage of the law, was, that a will as to land speaks at the date of it; and as to personal estate speaks at the time of the testator's death. The law created no new or different rule of construction, *but merely gave a [118 power to the testator to devise lands which he might possess, or be entitled to at the time of his death, if it should be his pleasure to do so. The presumption is, that the testator means to confine his bequest to land to which he is then entitled; and this presumption can only be overruled by words clearly showing a contrary intention."

In the case of *Hamersby v. —*, 3 Call, 289, it is said that the intention to pass after-acquired lands must appear by expressions applicable to that kind of property.

Fox, for defendant:

The first question presented by the verdict is, whether a devise, made of real estate, on July 25, 1811, by a man who then had only an equitable estate, but who afterward obtained the legal title before he died, will carry such a title to the devisees, and those claiming under them, as will bar a recovery, by the heirs at law of the devisor.

The statute in force at the date of this will may be found in vol. viii. 149. By the provisions of this act, a man "may devise all the estate, right, title, and *interest in possession*, reversion, or remainder, which he hath, or *at the time of his death shall have*, of, in, or to lands, tenements," etc. From the plain reading of this act, it appears to me perfectly clear that the will made in this instance passed not only what interest Smith had at the making of the will, but, also, all such interest, as, *at the time of his death, he should have*.

The statute is differently worded from the act of 32 Henry VIII., cap. 1. This difference of phraseology must produce a different construction of the act. I admit it to be well settled in England,

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that a devise of land passes only such land as the devisor had at the time of making the will; in other words, that lands acquired subsequent to the making of the will do not pass by the will. The law is otherwise, however, even in England, with respect to personal property. The will, it is said, speaks from the time of making, so far as real estate is concerned; and it speaks only from the death of the devisor in cases of personalty. Whether the reasons given for the distinction are sound, or unsound, is not very material. It is sufficient to say that the statute of Henry VIII. 119] *does not authorize a person to devise lands which he hath, or, *at the time of his death, may have*. The statute of Ohio, in force at the making of this will, did authorize such a devise. And as such a devise is held good in England, so far as personal estate is concerned, I can see no reason why the same construction should not be given to a devise of real estate where the statute authorizes such a will to be made. If the devise was *confined* to a particular piece of real estate, subsequently acquired land could not pass, because it would be evident that such could not have been the testator's intention. But where a man devises all his property, without designating any particular piece, and the law says he may devise, not only what he has, but all which at the time of his death he may have, we must construe the will to cover all the land he may have at the time of his death.

But if the court should be of opinion that the will now before the court would not pass lands purchased by Charles Smith, after making his will, still I contend that inasmuch as Smith had purchased this land before making his will, he had at the time of making the will an interest, which he passed by the will, and that the legal title, subsequently acquired, related back to the time of the original purchase.

It will not be denied, I presume, that an equitable title may be devised. The statute enables a man to devise any possible interest which he may have at the time of making his will, either in possession, reversion, or remainder.

The English and American authorities are also full and satisfactory upon the effect of devising an equitable estate. 10 Vesey. 613, 614; 2 Ch. Cas. 144; 1 Id. 39; 3 Johns. Ch. 316. And so far is this doctrine carried, that the devisee is entitled to call upon the executors to pay the purchase money due on the estate purchased. 10 Ves. 614, 605, 610; 3 Johns. Ch. 316. There are not

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many cases to be found at law where this question has been decided; there is one very analogous case which, I think, is conclusive upon this case. Prior to the statute of uses, a man having the use, or beneficial interest in an estate, had nothing more than an equitable estate; and it was decided at law that where a man, having the use only, devised the same, and afterward the statute having passed, it vested the legal title in the *cestui que use*, who died, and it was held that the devisee had *the legal title* [120 vested in him. 1 Roll. Abr. 616, pl. 3. In *Bridges v. Duchess of Chandos*, 2 Vesey, jr. 429, the lord chancellor, remarking upon this case, says, "that is exactly the case of an equitable estate devised, and a conveyance taken afterward of the legal estate; and this court was so far from determining without considering what the rule of law would be, that here is the very point decided by a court of law."

In *Selwyn v. Selwyn*, 2 Burr. 1135, it appears the father and son executed a bargain and sale to a third person, to make him a tenant to the precipe for suffering a common recovery, the uses of which were to be for the father for life, remainder to the son in fee. After the writ was sued out, and before the recovery suffered, the son makes a will and devises the land in fee, and dies after the recovery was completed, without altering the will. The question was, whether the will conveyed the land. It is perfectly clear that at the time of making the will the son had only an equity. It is also clear that by the subsequent recovery he was vested with the legal title. The court held that the title to the land passed by the will; and though the court gave no reasons for their decisions, the reporter supposes, "they considered the whole as one conveyance, which must relate to the date of the bargain and sale; which was perfected, made absolute, and delivered from objections by the subsequent ceremonies." And Lord Mansfield, in *Roe and Norden v. Griffiths*, 1 Black. 605, in referring to the case of *Selwyn v. Selwyn*, places the decision on the same ground.

So also in the case of a surrender of a copyhold estate, although the surrenderee has no estate in the premises surrendered until his admission, yet, on being admitted, he is in by relation to the surrender, from which date his admission operates; and in declaring in ejectment he can lay his demise immediately from the surrender. 1 Term, 600.

The principle, indeed, appears to be universal that where divers

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acts go to constitute a conveyance, estate, or thing, the original act is to be preferred, and to this original act all others have relation.

Thus in *Heath and another v. Ross*, 12 Johns. 140, a patent was dated December 4, 1810, but did not pass the great seal until the 121] 28th of the same month. During the period *between the 4th and 28th, a quantity of timber was cut by the defendants, and it was held that no title passed until the patent was delivered, yet after delivery the title related back to the 4th December, and the defendants were held liable.

So in *Jackson v. Dickenson*, 15 Johns. 309, a purchase was made at sheriff's sale, March 1, and the deed not delivered until March 19, and yet the court held the deed good, by relation, from March 1, and thereby prevented a bill in chancery, filed March 13, from operating as a *lis pendens*, so as to affect the purchaser by the decree rendered. The court recognize the doctrine distinctly and fully, that "the time to which the grant is to relate, is the time when the bargain or contract for the sale and purchase of the land was finally concluded between the grantor and grantee." *Id.* 316.

Again, in *Demarest and wife v. Wynkoop et al.*, 3 Johns. Ch. 146, a deed, made nineteen years after a sale, was held to relate back to the purchase.

The same doctrine is recognized in 7 Mass. 381, and 1 Johns. Cas. 81, 85.

By the COURT:

The statute of Ohio is much more comprehensive in its terms than those of 32 and 34 Henry VIII. "Every male person aged twenty-one years, or upward, being of sound mind, shall have power at his or her will and pleasure, by last will and testament, to devise all the estate, right, title, and interest, in possession, reversion, or remainder, which he or she hath, or at the time of his or her death shall have, in, or to, lands, tenements, hereditaments, annuities, or rents charged upon, or issuing out of them. 6-Ohio L. 64.

The third section provides for the revocation of wills, in the details of which, an alteration of the estate, after making and publishing the will, is not mentioned.

A prominent feature of the English law is to favor the heir, and prevent disinherison. This has introduced the fixed principle

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that at the inception of the will a man must be seized of the estate he devises, which should remain unaltered to the time of its consummation by his death. Pow. on Dev. 566. The difference in circumstances has, with us, *led to a difference in [122] legislation, and cases may arise in which our courts may, with great propriety, depart, in their judicial decisions, from those of England, upon questions arising out of wills. The laws of the various states show that it is the general policy of the government, that estates should not accumulate in families, or succeed in perpetuity. This is universally supposed to be the most effectual way to guard from degeneracy and destruction our free and equal institutions. Notwithstanding this solicitude in favor of the heir which is manifested in the course of decisions in that country, it has been held that when a devise is made in general words, it will carry the estate both in law and equity. 1 Ves. 437. So any contract which a court of equity would enforce on an application for a specific performance, would be sufficient to pass under sweeping words in a will. 1 Ves. 437, 494; Pow. on Dev. 208. But such contract must exist at the time of making the will, because one having no title whatever can devise nothing. 2 P. Wms. 629. It has also been decided that if a man devise all his lands for the payment of his debts, and afterward purchase lands, although there were no articles of agreement previous to the will, a sale will be decreed of those after-purchased lands. 2 Ch. Cas. 144. It appears to be the settled law in England, that an equity may be devised, and if a deed is not executed during the life of the testator, the obligor will be held a trustee for the deviser, and may compel an execution of the articles for his benefit. If the testator may pass equitable interests in land, by will, in England, there can be no doubt he may do it under the more comprehensive terms of our statute. In this case no doubt can exist as to the intention of the testator. The words embrace his whole estate. It is beyond controversy that whatever interest the testator had in this land, when the will was made and published, passed to Agnes Smith, his wife.

The question more difficult, is, whether getting in the legal estate before his death, and after the execution of the will, amounts to a revocation, and whether the legal estate so obtained, passed by the will, or descends to the heir.

In the case of *Rex, ex dem. Norden, v. Griffiths and others*, it

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was held that an admittance would refer back to a surrender, being only a completion of it. 4 Burr. 1952.

123] *In *Selwin v. Selwin*, 2 Burr. 1131, the principle was decided that the whole of a conveyance shall be taken together, and the several parts of it shall have relation back to the principal part. S., being seized in fee by indenture of lease and release, conveyed to uses and covenanted to levy a fine. All were adjudged an assurance. 2 Bur. 704. Mr. Justice Wilmot: "He considered these deeds as a covenant to levy a fine, and they ought, with the fine, to be considered as one and the same assurance." The same principle was decided in *Croke Ja.* 643. All the court held that a bargain and sale, and the fine and recovery, are but one assurance, and, says the court: "The recovery being executed, which is grounded upon the covenant, is *quasi* a conveyance to the use *ab initio*." 2 Ves. 681. These cases are deemed analogous in principle to the one under consideration. The equity which existed at the time of making the will clearly passed, and the conveyance to the deviser is no change of the estate to work a revocation, but rather a confirmation of it.

For the purpose of protecting the devisee, it would but conform to the authorities to hold the legal conveyance accepted by the testator, posterior to the execution of the will, as an act of confirmation on his part, and to consider them both as one assurance. It can not be doubted if the testator had refused to accept the deed in his lifetime, the right would have been complete in the devisee, and she could have compelled a specific performance of the contract. The principles involved in this case were decided in *Gist's Heirs v. Robinet*, 3 Bibb, 2. The case was this: Under the royal proclamation of 1763, Thomas Gist, for military services in the war with Great Britain and France, became entitled to a grant of two thousand acres of land, upon his personal application to any of the governors of the colonies of North America. In 1772, before he applied for his claim, he made and published his will, by which he devised to his sister, Anne Gist, one moiety of his whole estate, both real and personal; the other moiety he gave to Elizabeth Johnson. He afterward obtained a warrant, caused it to be surveyed, and in January, 1780, obtained a grant. He died in 1785, without altering or republishing his will, leaving Nathaniel Gist his heir at law. Anne Gist conveyed to Nathaniel Gist, in fee, a moiety of the tract of land; Nathaniel died, leaving the les-

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sors of *the plaintiff his heirs at law. The question was, [124 whether Thomas Gist, at the time of making his will, had such an interest, under the proclamation of 1763, as was transmissible by devise. The court lay down the doctrine as incontrovertible that an equity will pass by a devise. The judgment, which had been in favor of the plaintiff for a moiety only, was affirmed. The effect of this decision is, that when an equity existed at the time of publishing the will, and before the testator's death it was carried into grant, the equitable and legal estate could not be parted, but the latter attached to the former, so as to vest a complete estate in the devisee. If otherwise, the lessor of the plaintiff, who was heir at law of the testator, must have recovered the whole tract of land instead of the moiety, and turned the devisee of the other moiety to a court of chancery for relief. This defendant is the grantee of the devisee, and if the legal estate has descended to the heir at law of the testator, whatever equities may exist, the plaintiff is entitled to recover in this action. The cases before cited would appear, however, fully to warrant this court in considering the estate complete in the devisee in consequence of the will vesting the equity, and by reason that the legal estate was acquired by the testator before his death. To consider it in any other light would be separating the equitable and legal estate to no purpose, except to produce litigation and expense, or indulge in subtleties which have little to do with reason or justice. The court are therefore of opinion that the acceptance of a deed after the execution of the will is not an ademption of the legacy, and for the purpose of preventing circuitry of action, the deed may be attached to the devise and considered but one assurance.

Judgment on the verdict.

***BANK OF CHILLICOTHE v. JOSEPH L. YOE, ADMINISTRATOR [125
OF JESSE MCKAY.**

Equity can not interfere to aid a bank against a deceased indorser, when there is judgment against the principal and another indorser, although the principal be insolvent, unless it be shown that nothing can be made at law, from the existing judgment, against the indorser.

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*THIS case was adjourned here for decision from the county of Ross. It was a bill in chancery, and the case made was as follows: On May 19, 1819, Daniel Vanmetre made his promissory note to Jesse McKay, payable at the Bank of Chillicothe, by whom and John Creed it was indorsed, and discounted at the bank. In consequence of non-payment it was duly protested, and suit brought, under the statute, against the maker and indorsers jointly. Process was served on Vanmetre and Creed, and returned not served as to McKay. Judgment was rendered against Vanmetre and Creed, and Vanmetre was deceased and insolvent. McKay was also deceased, no judgment having been rendered against him in his lifetime, and the defendant was his administrator. The object of the bill was to set up the claim, in behalf of the bank, against the administrator of McKay. It alleged the insolvency of the principal debtor, Vanmetre, but was silent as to the responsibility of Creed, the other indorser, against whom judgment at law had been obtained.

The defendant demurred.

EWING, for complainant.

KING, for defendant.

By the COURT:

The question to be decided is, whether, upon a joint and several contract, made by the statute joint as to the suit and judgment, the complainants can go into equity before they have made use of their legal remedies. Section 9 of the act to regulate judicial proceedings, where banks and bankers are parties, authorizes a joint action against the drawers and indorsers, and declares that if the bank shall institute a separate action against drawer and indorser, no costs shall be recovered. The complainants claim they have lost their legal remedy, by the death of McKay, under the [126] *provision of the statute. From anything that appears in the bill, the legal remedy is still perfect as against Creed, the survivor, whose insolvency is not even suggested, and against whom process of execution has not been taken. The most favorable aspect of the bill places the complainants' equity upon the restoration upon a naked legal right, lost by the act of God, under our statutory regulations concerning banks. A court of chancery

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would probably be open to the complainants, when they shall have exhausted their legal remedies, if a balance still remains due upon the judgment. But the complainants show no present necessity for a decree against the representatives of McKay, nor have they even alleged that such decree would facilitate the collection of their judgment. They came into this court, having, from their own showing, a perfect legal remedy against the survivor, which they have neglected to enforce, without furnishing any excuse whatever for their negligence. They are here as volunteers for one of the indorsers, without showing why the estate of the other should be liable for the payment of their judgment. In this bill the court can not settle the equitable rights of the indorsers, especially as only one of them is made a party. Those who are interested should be left to their own litigation without the interference of strangers. Bill dismissed with costs.

DAVID WADE, TREASURER OF HAMILTON COUNTY, FOR THE USE
OF SAMUEL McHENRY, v. THOMAS GRAHAM ET AL.

Securities of an administrator are liable on their bond, for the proceeds of lands sold by the administrator, under an order of court for the payment of debts.

THIS was an action of debt on an administrator's bond. The facts are thus stated: This suit was brought on the bond of the administrator of Daniel Symmes, executed at the time of the appointment of the administrator, to recover the amount of a judgment in favor of Samuel McHenry, a creditor of the estate. On the trial before the jury, the plaintiff offered in evidence the proceeds of the real estate of the intestate, sold by the administrator by order of the court, *to which evidence the defendants [127 objected. The objection was overruled by the court and the evidence admitted, and a verdict given for the plaintiff. For this supposed mistake of law the defendants moved a new trial, and the decision of the motion was adjourned here from the county of Hamilton.

Wade, Treasurer, etc. v. Graham et al.

J. W. PIATT, for plaintiff.

N. WRIGHT, for defendants.

By the COURT:

The condition of an administrator's bond is, that he shall faithfully perform all the duties required of him. Section 18 of the act (prescribing the duties of administrators), directs, most explicitly, the distribution of the "assets," arising from the sale of real estate by an administrator. It requires the funeral expenses, and those of the last sickness, with the cost of the administration, to be paid; secondly, judgments rendered in the lifetime of the intestate, and lastly, distribution of the residue amongst the creditors. Nothing can be clearer than that the condition of an administrator's bond was intended to secure, to all interested in the estate, every duty which the law enjoins upon that officer. Certain duties are required of him respecting the distribution of assets arising from the sale of lands; can it be doubted that his bond secures fidelity in the performance of them? If the terms of the statute, however, left a doubt as to the extent of the liability of the administrator, and his security upon the bond, more than twenty years' uniform practice and usage have made it cover money arising from the sale of real as well as personal property. It is true, when the court grant an order to sell real estate, they have the power, for the security of heirs and creditors, to require from the administrator what security they may deem proper, respect being had to the value of the estate. When letters of administration are granted, it can not always be known that a necessity exists for the sale of real estate, to discharge the debts of the intestate. The penalty of the bond, therefore, is usually required 128] in double the amount of the personal *property. This amount is frequently insufficient to cover the assets arising from the sale of lands; and sometimes the securities become irresponsible for the additional sums. The legislature, contemplating these things, gave a discretionary power to the courts to require what security they might deem proper, when they granted an order for the sale of real estate. This appears to be a reasonable exposition of the legislature's intention, and it is the same it has uniformly received in practice. When the penalty of the bond is sufficient, and the obligors have been considered responsible, no other se-

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curity has been demanded by the courts; when they were not, an additional bond has been taken before the order of sale granted; the administrator is held liable on his bond to the same extent, for money arising from the sale of real estate as for the proceeds of personal property. The proceeds of the former are, to all intents and purposes, assets as well as the latter. They are both appropriated in the same manner, and when land is turned into money, it is instantaneously assets, according to the legal acceptance of the term. The case of *Truman v. Anderson and others*, 11 Mass. 190, has been cited as an authority in point for the defendant. The question submitted in that case was whether the bond of an administratrix was forfeited for her neglect to apply for a license to sell the real estate of her intestate, for the payment of his debts. This is not the case here. The question to be decided by the court is, whether the administrator and his security are liable for the proceeds of real estate, *actually sold*, and which came into the hands of the administrator. It will be sufficient to decide the point determined by the Supreme Court of Massachusetts when presented. It clearly does not arise in this case. In deciding the point under consideration, we rely upon our own practice, which has given construction to our statutes, and, it is believed a correct one, according to the principles of sound policy and just reasoning. It is the opinion of the court the condition of an administrator's bond covers all assets, to the extent of the penalty, at least, whether personal, or arising from the sale of real estate. Motion overruled.

Judgment on the verdict.

 *LESSEE OF GOFORTH v. N. LONGWORTH.

[129]

In a case of sale of lands of decedent by executors or administrators, the record must show an order of sale by the court, or the sale is void.

THIS was an ejectment adjourned here for decision from Hamilton county. The plaintiff claimed as heir at law of Aaron Goforth, who died legally seized of the lot in controversy, being No. 161, in Cincinnati. The seizin of the ancestor and the heirship were admitted. The defendant claimed under an alleged sale and

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conveyance, made by the administrators of A. Goforth, of the lot in question, for the payment of debts. In support of this claim he gave in evidence, a deed from the administrators, dated January 26, 1814, which recited that the sale was made by the administrators, under an order of court. To sustain this deed, the defendant further gave in evidence an order of court, dated of August term, 1813, in these words: "Petition and motion made by the administrators of A. Goforth, deceased, for the sale of real estate. Account or statement exhibited to court, who appoint Joseph Carpenter, Ethan Stone, and Richard Fosdick, appraisers," etc.

An appraisement made by the persons named, of real estate, and returned to court, including the lot in dispute, was also given in evidence, which was dated December 11, 1813. An account of sales, as made by the administrators, dated December 15, 1813, was in proof, in which the lot 161 was set down as sold December 14, 1813. This account was marked filed as of April 14, 1814. No other order of court, in the premises, was given in evidence, except the one before quoted. The question submitted for decision was, whether upon the proofs exhibited, the sale, by the administrators, was valid.

CASWELL and STARR, for the plaintiff.

N. WRIGHT, for defendant.

By the Court:

It is now well settled that courts give a liberal construction to statutes authorizing sales of real estate by executors or administrators. Public policy requires that all reasonable *presumptions should be made in support of such sales, especially respecting matters *in pais*. The number of titles thus derived, and the too frequent inaccuracy of clerks and others concerned in effecting these sales, render this necessary. But where the statute is explicit and unambiguous, in its terms, the court is not authorized to dispense with the formalities and modes of proceeding prescribed, or to supply them by presumptions and constructions.

The sale, relied upon by the defendant, was made under the statute of February 10, 1810. Section 32 provides "that when it shall be made appear to the satisfaction of the court that it is necessary to sell real property for the discharge of debts, as specified

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in the preceding section, they shall appoint three disinterested men to view the lands, tenements, or hereditaments, so to be sold, and return to court under oath, a statement of the value thereof, *after which the court shall direct* the executor or executors, administrator or administrators, to proceed to sell, either the whole or a part, as they may think proper, of such real estate, after giving notice," etc.

The provisions here cited require that certain acts shall be done by the court of common pleas, and these constitute the foundation upon which the sale of a deceased person's real estate by his personal representative must rest. That these acts were done by the court must be evidenced by the record of their proceedings. The law requires that the court shall appoint valuers, who shall value the estate, and make a return of the valuation, "*after which the court shall direct*" the whole or a part to be sold, "*as they may think proper.*" This act, to be performed by the court, is essentially of a judicial character. A judgment is to be made up and pronounced; and this judgment is the foundation of the administrator's or executor's power to sell. Were such a judgment, order, or direction produced, it would be correct to infer that it was rendered or made upon a proper state of facts. The appointment and return of the valuers, with other preliminary proceedings, might be inferred or presumed. But the judgment or direction stands upon a different principle. It can only exist as matter of record, and can in no other mode be proven.

No transcript of any such record is produced; nor anything more than the order appointing the valuers, which in *the* [131 nature of things, preceded the direction, or order to sell; because between that appointment, and the final direction to sell, the valuers were to perform the duties required of them by law. The counsel, aware of the necessity of adducing record evidence of this order, or judgment, attempt to deduce it from the "*et cetera*" at the end of the order appointing valuers. But such an interpretation of the "*et cetera*," in the case before us, is wholly inadmissible. Lord Coke himself, whose commentary upon the "*et cetera*" of Littleton is a standing jest with the profession, never could have thought that matter subsequent, and that the final decision of the court in the case could be included in an "*et cetera*" attached to the incipient order in the proceedings.

The statutory provisions in respect to cases of sales of real es-

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tate, by the personal representative, are intended to protect the interests of heirs and creditors, as well as that of purchasers. The power of the personal representative over the real estate of the deceased is derivative and limited. It is derived from the act of the court, in conformity to the law. The discretion of the court must be exercised and declared upon the subject, and, without this, the act of the administrator or executor is void, because based upon no legal foundation. It is a case of acting under a power where no power is conferred. The act must therefore be void. In this case there is the proper proof that valuers were appointed and made a return. These steps prepared the subject for the court to act upon finally. But there is no evidence that they did finally act upon it. On the contrary, there are facts stated that warrant a contrary conclusion. The appraisement is dated December 11, 1813, and the administrators report the sale as made the 14th of the same month. In this period of time it was impossible for the court to act, and then for the administrator to give the legal notice of sale. It seems, therefore, to be an almost necessary conclusion, that the administrators did not consider an order or direction to sell, founded upon the return of the valuers, as necessary to invest them with the power to effect a sale. We can not otherwise account for their appointing and advertising a sale, even before the valuation was made, and, of consequence, before any power to sell could be vested in them. They mistook their duty and their powers. We might as well attempt to

132] *sustain a sheriff's deed for land sold on execution where the pleadings were found, but no judgment, as to sustain the sale by the administrators, in this case. To divest the heirs of their estate, by the sale of the personal representative, that sale must be made in substantial compliance with the statute. This must appear on the record, or arise on a just implication from it. Here we have neither. The judgment must be for the plaintiff.

ROBERT COWDIN v. JOSEPH HURFORD.

Foreign attachment can not be sustained against one of several joint and several contractors.

THIS was a writ of error, adjourned here for decision from the county of Jefferson. The original suit was an attachment sued out of the court of common pleas of Jefferson county, upon the affidavit of the defendant in error, filed in January, 1823. Upon the return of the writ of attachment, Joseph Hurford filed a declaration charging the *assumpsit* upon Robert Cowdin. George Starr, claiming to be creditor, filed his declaration in the same manner. Other declarations were in like manner filed. Thomas Stevenson counts, "that Robert Cowdin, jointly with one Robert Gilmore, they being then and there joint partners, made his certain receipt, etc., jointly with the said Robert Gilmore, by which said receipt said Cowdin acknowledged," etc. The promise was laid, as made by the defendant in attachment, to the plaintiff. To all these declarations the defendant in attachment pleaded in abatement, because the undertaking, if any, was by said Cowdin and one Robert Gilmore, who is still living. Demurrers and joinders to the pleas. The court below adjudged the several pleas in abatement insufficient, and gave several judgments, to reverse which this writ of error is brought.

TAPPAN, for plaintiff in error, cited 2 Saund. 210, n.; 2 Bos. & Pul. 42; Com. Dig., Abatement, F.

*J. & D. COLLIER, for defendant in error, cited 1 Saund. [133 291, b, n. 4; 5 Term, 651; 1 East, 20; 4 Term, 725; 3 Camp. 50; 1 B. & A. 224; 2 Taunt. 254; 5 Burr. 2614; 2 East, 313; 2 D. & R. 439.

By the COURT:

The writ of attachment appears to have been issued under the statute of 1810; but the subsequent proceedings have been had under the law which took effect on June 1, 1824. The pleadings disclose the fact, that one of two partners lived in the county of Jefferson and the other was not a resident of the state. The affidavit was made and the writ issued against the absent partner.

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The declaration charged him alone as the promisor, and the judgments are rendered against him without noticing the liability of the other partner. The correctness of the whole pleadings is fairly before the court upon the assignment of general errors. The question principally to be considered is, whether in proceedings in attachments upon contracts, expressed or implied, where there are partners, it is necessary to charge them in the declaration, as in other actions. Section 13 of the act is in these words: "Where two or more are jointly bound, or indebted, either as joint obligors, partners, or otherwise, the writ of attachment provided for by this act may be issued against the separate or joint estates, or both, of such joint debtors, or any of them, in the same manner, and under the same restrictions as is provided for by this act in other cases." Now, this is merely directing the mode of proceedings *in rem*, where the defendants are joint obligors or partners; but neither dispenses with the proper parties to the suit nor with the necessity of pleading according to the established usages of law. It is not now necessary to decide whether the writ can, in any case, issue against partners, or others jointly liable, when one of the defendants is at the time resident within the jurisdiction. There is no just inference, however, to be drawn from this part of the statute, that the legislature intended to change either the form or substance of special pleading, so as to authorize a declaration and an *assumpsit* laid, or a recovery had against one of two or more [134] partners, without noticing the liability of the others. It is further provided, by section 9, "that the plaintiff in attachment, and every other creditor, at or before the third term, may file their declarations, setting forth, in a proper manner, their cause of action, etc., and the defendant may plead to any or all of the declarations." In legal parlance, the plaintiff can not be said "to set forth his cause of action in a proper manner," when there is a joint undertaking by two and the *assumpsit* is laid as made by one only. The declaration, in this case, neither accords with the law nor the facts. It ought not to be presumed that the legislature intended the facts should not be disclosed in the declaration according to the settled legal forms. They have, indeed, used strong and unequivocal terms to the contrary. The court feels great anxiety to preserve the rules of special pleading, which have been founded in wisdom and are the safest guide of the profession. To depart

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from them is at best a dangerous experiment, often leading to inexplicable confusion and great injustice.

Whatever effect was intended to be given to the writ of attachment, against the property of partners or other defendants jointly liable, the court is not able, from the most attentive examination of the statute, to discover any intention to change the law of pleading or the final judgment to be rendered. Separate actions and independent judgments upon liabilities, in their very nature joint, would be an innovation upon the settled principles of law, which can not be permitted without the legislature expressed an intention to that effect in the most clear and unambiguous terms. The court are of opinion that the omission to join a living partner in the writ and declaration, is as fatal in attachment, if pleaded in abatement, as in any other form of action. The judgment is therefore reversed.

*S. H. HILL v. JOHN KLING.

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On a *scire facias* to subject debtor's lands to execution on judgment before a justice, it is not necessary that the sheriff should retain the execution from the justice thirty days. Nor is it necessary to take a rule for plea; judgment awarding execution may be entered at the return term of the writ.

THIS was a writ of error to the court of common pleas of Richland county, adjourned here for decision from that county. The case was this:

On October 10, 1828, J. Kling recovered a judgment against S. H. Hill, before Justice Gardner, in Richland county, for eighty dollars and fifty-four cents and costs. Upon this judgment execution issued on the 11th of October, which was returned on the 16th of the same month, that there was no goods whereon to levy; but it is suggested that the defendant was possessed of lands and tenements within this county.

Upon this suggestion, on the same October 16, 1828, a *scire facias* was issued from the court of common pleas, at the suit of Kling against Hill, to appear and show cause, on the 20th instant, why execution should not issue on the judgment against his lands. The sheriff returned the *scire facias* duly executed on the 18th of October.

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and at the October term of the same year, judgment by default was rendered, that execution issue to take the lands of Hill. To reverse this judgment the writ of error was brought.

The errors assigned, were:

1. That on the judgment before the justice, execution issued on the 11th of October, returnable the 16th of the same month, which was a void execution, and laid no foundation for the *scire facias*.
2. The second error assigned involved the same proposition in different terms.
3. It was assigned for error that no suggestion was made on the transcript of the justice, that the defendant held lands.
4. It was error in the common pleas to render judgment on default, at the return term of the *scire facias*.
5. That judgment was rendered, without either rule or order on the defendant to plead.
6. The writ of *scire facias* was insufficient.

136] *PARISH & BOATT, for plaintiff in error.

J. M. MAY, for defendant in error.

By the COURT:

The plaintiff in error insists: 1. That the constable's return, having been made a short time after the execution came into his hands, is void.

2. That the court below erred in rendering a judgment at the term to which the *scire facias* was returnable.

5. That it was error to render judgment without rule or plea.

The third and fourth errors appear to have no foundation in fact, the record containing, with sufficient certainty, the suggestion that the judgment debtor was possessed of lands and tenements.

1. This question depends upon different principles from that which might arise between the party supposed to be injured by the return and the officer.

What might be the result of an action prosecuted against the constable, by the plaintiff in error, would depend on facts and circumstances which can not be collaterally determined between the present parties to the record. The statute does not fix any day upon which constables shall make return of executions di-

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rected to them. Executions are to be returned *within* thirty days. The proceedings of a constable, unless the statute otherwise provides, are strictly analogous to those of a sheriff, and his legal responsibilities are the same. A sheriff's return is parcel of the record, and in an action of debt upon it, *nil debet* is no plea. 2 Saund. 344, n. 2. The sheriff can not be permitted, either in pleading or by evidence, to falsify his return. 6 Mass. 325; 7 Mass. 388. A *scire facias* lies to a sheriff's return; it is, therefore, a part of the record. Croke Jas. 514. When the sheriff returns he has recovered a certain sum of money made by execution, this shall charge him, although none was actually recovered. 8 Johns. 16.

These authorities show that as between parties and privies, and the officer, except where the latter is charged upon its falsity, the return is matter of record, and therefore conclusive. *The [137 return is at the peril of the officer. If true, it is his protection; if false, he alone is responsible. If a return upon execution can be impeached, or falsified by the parties to the judgment, purchasers at sheriff's sales, whether of personal or real estate, would be without protection. It would be hard, indeed, if it was at the peril of the purchaser whether the return of the officer was true or false, especially where he must be absolutely ignorant of the fact. The point was decided in 4 Day, 1, in a case where bail was fixed, by the sheriff's return, before the return day of the execution.

2. The statute settles this point. The clerk shall issue a *scire facias* against such person to appear at the next term of the court of common pleas, and show cause why execution should not issue, and in case such person neglects to attend, or does not show cause to the court why execution should not issue, the court shall issue execution against the lands and tenements of such person, in the same manner as though judgment had been obtained in said court. The provisions of the statute clearly do not grant an imparlance to a term subsequent to the return of the *scire facias*.

Lastly, the rules of the common pleas are not exhibited, so that it can not be ascertained whether they extend to a case like this. It is no doubt competent for that court to establish rules of pleading upon *scire facias*, issued upon justices' transcripts; but such rules could not extend beyond the return term. The statute makes this a summary proceeding, in order, no doubt, to fix a lien upon

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the defendant's lands, and prevent frauds upon the judgment creditor, by alienation.

In courts of record, this lien is created from the rendition of the judgment. Justice and sound policy require the same course when judgments are rendered before justices of the peace. But as these proceedings are less notorious, and the business of transferring lands too complicated for inferior jurisdictions, the legislature intended to afford the most prompt and efficacious remedy in the courts of record.

This summary proceeding, expedited by the rules of court, as far as the law will warrant, can seldom operate injuriously or oppressively upon the debtor; but delay to the creditor might let in a paramount lien, where there was no superior equity, or justice.

Judgment affirmed.

138] *EXECUTOR OF OLIVER BIGELOW v. ADMINISTRATORS OF ELIHU BIGELOW.

When the obligor in a bond becomes administrator of the obligee, the bond is suspended, and the debt due becomes assets in the hands of the debtor, as administrator.

THIS case was adjourned here for decision from the county of Licking. It was an action of covenant, and the material facts of the case are as follow:

On April 26, 1815, Oliver Bigelow sold to Elihu Bigelow, a tract of land, and covenants in writing were entered into, by which Oliver Bigelow agreed to convey the land, and Elihu Bigelow agreed to pay Oliver the purchase money, in installments of two hundred dollars on demand, and two hundred dollars yearly, from the date of the article, until the whole was paid.

During the lifetime of Oliver Bigelow, several payments were made, and indorsed on the article. But before the contract was completed, Oliver Bigelow deceased, and letters of administration on his estate were granted to Elihu Bigelow, in virtue of which he became possessed of his own covenant to Oliver Bigelow. In his administration account Elihu Bigelow represented that there

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was due on this article to Oliver Bigelow the sum of one hundred and eighty dollars. Whilst acting as administrator, Elihu petitioned the court, under the statute, to complete the contract by ordering a conveyance, in which petition he alleged that the whole purchase money was paid.

Subsequent to this Elihu died, and the defendants became his administrators. It was also ascertained that Oliver left a will appointing the plaintiff his executor, who proved the will, and took letters testamentary. And having by some means obtained possession of the article of agreement, instituted this suit.

At the trial the jury found a special verdict, finding that the article was the deed of Elihu Bigelow, and that there was due upon it, to the estate of Oliver Bigelow, the sum of three hundred and nine dollars and sixty cents. And that the present plaintiff obtained the article without the consent of Elihu Bigelow or his administrators. Upon this special verdict, and an agreement of the other facts stated, the cause was reserved to be decided here.

*H. STANBERRY, for the plaintiff:

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The facts of this case are few, and yet so singularly complicated as to require a careful investigation. The principal difficulty is occasioned by the debtor of the intestate becoming also his administrator. There is one fact found by the special verdict, which must be taken as established, that the bond debt has never been actually paid.

The plaintiffs, who represent the obligee, have prosecuted their action upon this obligation. They show that a part of it is yet due, and this they claim to recover. The manner in which they possessed themselves of this instrument is wholly immaterial. If it evidence a subsisting debt due to their testator, or rather to them as his representatives, it of right belongs to them, and their title to it can not be disputed, at least in this action. It is unnecessary to cite authorities to this position. The well-known case in Vernon's Reports, in which the person who had *stolen* his deed from a counselor's table, and was enabled to protect himself with the legal advantage it gave him, will be recollected.

The plaintiffs then, affirmatively, show a right to recover on this bond. Let us see what the defendants have to object to this recovery. They say that when Elihu Bigelow, the obligor, became the administrator of Oliver Bigelow, the obligee, *eo instanti*, the bond merged, and the amount due upon it became *assets*

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in his hands. This ground can not be maintained as a defense to this action.

It is clear that the debtor obtains no advantage of his creditor, by administering upon his estate. He does not stand in the situation of a debtor appointed the *executor* of his creditor. In that case the old authorities are, that if the estate be solvent, the debt is absolutely merged and satisfied. Needham's case, 5 Co. 30. In the modern cases, it is not held to be an extinguishment of the debt in any event, except there be a plain intention to that effect expressed in the will. But it has never been held that the granting of administration to the debtor worked this merger. 8 Co. 136; 1 Roll. 934; 1 Sid. 79; 1 Salk. 306, n. A. The distinction between the cases is obvious. In the first, the executor being appointed by the testator, he was taken, if nothing to the contrary appeared on the [140] will, to have intended a release of the debt, as a *recompense for the trouble cast by him upon the executor; but the administrator not being appointed by the deceased, no such intention can be presumed. Com. Dig., Adm'r, 336, 337.

This debt was, then, not extinguished by this act, nor was it prejudiced. The taking of administration by Elihu, the debtor, was of his own motion. The law will intend it to have been for the benefit of his intestate, and will not suffer the estate to be prejudiced by the legal consequences of that act. But the administrator can not sue himself, to recover the debt which is due from him individually, to the estate, or rather to himself in his representative capacity. This inability to sue would give him, as debtor, an advantage which the law will not tolerate; and therefore, *in favor of the estate*, the creditor or heir may, if either choose to do so, hold him accountable for the amount of his debt as assets. But the debt is not to all purposes considered as assets. In reality it continues a debt, inasmuch as it is not actually paid, and therefore, although the administrator, for the purposes of justice, is estopped from denying that it is assets, yet his securities are not. They are only liable for debts actually collected by him, or which he might have collected by proper diligence. Their liability is not altered by the administrator being the debtor. If the administrator were, for instance, insolvent, they would not be charged with this desperate debt. They do not guaranty his responsibility as a debtor of the estate, but only his honesty and the faithful discharge of his duties. I have gone into this detail, preparatory to

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a view of this case in the light in which it should be regarded for the protection of the estate, the creditor, and the heir.

Before Elihu Bigelow connected himself with this estate, as administrator, he was a debtor to the estate by bond, for the payment of the consideration of a tract of land which he had purchased of Oliver Bigelow. The legal title to the land had been retained by Oliver, as security for the unpaid purchase money, and passed, at his decease, to his heir. This debt did not then rest upon the personal responsibility of Elihu; a fund was appropriated and retained for its security, over which the creditor had given the debtor no control, and which the law will not take from him until his debt be paid. Elihu administers upon the estate of Oliver. His *debt is not extinguished by that act, nor is it actually [141] paid. Indeed, Elihu as administrator, does not treat it as then paid. He does not place any money to the *credit* of the estate, as representing that debt. He does not *charge* the estate with any money paid out of his own funds on account of it, but he places it in his inventory on the footing of an unpaid debt.

It is contended that this act of administration operated an entire transmutation of the rights and liabilities which, prior to it, were incident to this bond. It is said, that although the debt is not extinguished, yet that the bond is merged, and can only be used to ascertain the amount. That it stands as if the bond were actually paid in full, and the amount of it has become assets; money collected and in the hands of the administrator; and that the individual obligor was discharged from all liability; his bond satisfied, and he of course entitled to a conveyance of the land, and put in a situation with regard to the fund, that enables him to control it, and place it beyond the reach of the original claim. These consequences would be manifestly injurious to the creditors and heirs of the estate; the fund is gone, and in the place of it is substituted the mere personal responsibility of Elihu Bigelow; for, I repeat it, in case of his insolvency, his securities could not be made to answer this debt. And this wrong is accomplished by the debtor himself. The heir and creditors are in no fault; they are not chargeable with any *laches*; they have done no act to alter their debt, and especially during the continuance of his administration, they never treated the debt as modified or paid. They did not choose to hold Elihu responsible for the money as actually received; and as soon as his administration is determined, the lawful executor of Oliver

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Bigelow insists upon the bond, and refuses to be subrogated to an action for the money.

There is nothing, then, in the acts of the parties, to modify this debt, and under such circumstances, as a modification would work an injury to the estate, the presumption of payment to the administrator, which is made for the benefit of the estate, will not be applied.

It seems to me that the only necessary effect of the administration upon this debt, was to suspend the right of action. Whether [142] it should be considered paid and assets, would *depend upon the consequences of that presumption. If it were a debt originally resting on the sole responsibility of the debtor, the presumption of payment would be made, for that would place it upon the same footing; but if the debt originally were strengthened with other security, it would not.

Suppose a bond secured by mortgage. The obligor, who has no estate but the mortgaged premises, administers to the obligee. According to the doctrine of the opposite counsel, that act, by an inevitable necessity, carries with it a presumption of payment and merger of the bond. The bond is the principal, and the lien on the land, which is but the incident, is gone with it, and there remains the personal responsibility of the administrator, which the intestate, at the creation of the debt, would not rely upon, and which, in fact, is not worth a rush.

Another case suggests itself. A trespass upon the real estate of the intestate before his death; the trespasser becomes the administrator. What is the consequence with regard to this debt? It is not extinguished, nor can the presumption of payment apply to it, on account of its uncertainty. During the continuance of the debtor's administration, it can not be prosecuted by action, but as soon as his administration determines, it may be recovered by those who come after him and represent the estate; otherwise manifest injustice is done by the act of the debtor, and this the law will not tolerate. The same difficulty of applying the presumption of payment, occurs in all debts which happen to be uncertain and unliquidated in amount. These cases in illustration show clearly that this presumption is not necessary and inevitable, and that the right of action upon the original claim may survive, where the purposes of justice require that it should. Indeed, there are many instances where a right of action is temporarily suspended, and yet after-

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ward capable of being asserted. Between an intestacy and the granting of administration, there is a total suspension. So in the case of an alien enemy, and others of a temporary disability. But again, this presumption of the payment of the debt, and that it is resolved into assets, is made for the particular emergency. The reason and propriety of its operation cease when the emergency is passed.

*The administration of Elibu Bigelow was temporary, and [143 the estate was not settled in his hands. The present plaintiffs have succeeded him, and finding this bond, instead of the supposed assets, have brought their action upon it. There is now no necessity for the legal presumption. The debtor has lost his character of creditor. He stands as he did before he administered, and so does the debt, for in fact it is yet due. Will the court, then, by a mere fiction of law, made for the benefit of the estate, and not intended to operate, except from an instant necessity, now when its operation is not needed, and would work an injury, oppose it to the recovery of this claim? And to what purpose, but to lead to multiplicity of action and the jeopardy of rights.

And here, however strong the presumption that the debt has become assets, might be of itself, yet now it can not be made. The special verdict is express, that *the bond* is now due; against that no presumption can be made.

It is further contended that the statement of Elibu Bigelow in his petition for a deed, and the finding of the court, show a payment of the debt. That anomalous proceeding can have no effect in any imaginable point of view upon this case as it now stands. The decree as stated in the defendants' notice was never carried into effect. It must either be referred to as evidence of the payment of the bond, or as an adjudication by which the bond was merged.

Suppose it to be proper evidence of the payment, it is evidence in relation to a fact established beyond controversy, by the special verdict, and which can not now be contradicted. This is not a motion for a new trial, on the ground of a verdict contrary to evidence, or by reason of newly discovered testimony. Any matter, then, to impeach the facts found by this verdict can have no relevancy.

The same objections go against the decree as evidence of a merger of this bond, for the jury have found it to be still due and subsist-

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ing. And, indeed, without this finding, the decree would not have that effect, or any other, to prejudice the rights of the plaintiffs, for obvious reasons. It was a proceeding wholly *ex parte*, without mutuality, and founded on the debtor's false or mistaken statements. It can, therefore, have no operation here. 1 Stark Ev. 185, 195.

144] *DILLE, for defendants :

The power and duties of an administrator in this state are defined by statute, and not as in England regulated by the usages of the spiritual courts and the principles of the civil law. Our statute, passed January 25, 1816, provides, that if after an administrator has been appointed, "it shall appear to the court that any last will and testament was made by the deceased, and the executor, or executors, therein named shall prove the same agreeably to law, and request letters testamentary thereon, then the court shall require the administrator, or administrators, to deliver such letters of administration, together with his or their proceedings, to the satisfaction of the court." 14 Ohio L. 151. The "act defining the duties of executors and administrators," passed February 11, 1824, makes no material variation from the act of 1816, in this respect.

In England, it was formerly held that "if the testator makes a will, and the ordinary, without taking notice of any such will, grants administration to another, and afterward the executor comes in and proves the will, such executor shall regularly avoid all mesne acts done by the administrator," and the reason which is given is, "that the executor, by being made such, had an interest which the ordinary could not deprive him of." Plow. 277; 2 Bac. Abr. 411. And it still seems to be the doctrine, from the same authority, that the administrator is liable under such circumstances to the executor in an action of trespass, even though the will was not discovered until after administration granted; but if, in such case, "he paid debts, legacies, or funerals, which the executor was bound to pay, he shall recoup so much in damages." Now, compare these principles with the provisions of our statute, and we will find that the common, or rather civil law maxims, do not apply in a case of this kind in this state.

But if the analogies of the common law have any weight here, it may be well to inquire what were the decisions in case administration was improperly granted, afterward revoked, and a new

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administrator (the next of kin, or such other person legally entitled) is appointed. In Packman's *case, 6 Coke, 18, it was [145 decided that even though the first administrator fraudulently sold the goods of the deceased during the pendency of a citation to revoke his power, in order to defeat the plaintiff in the spiritual court of the effect of his suit, that the first administrator had the absolute property of the goods in him, and without question he might give them to whom he pleased. If the gift be by covin, it shall be void by the statute 13 Eliz. against a creditor, but it remains good against the second administrator.

I have cited the above provisions of the statute, and the case of Packman, from Coke, to support me in this position, that the administrator, who is appointed, and takes upon himself the administration of the deceased's estate, before the discovery of the will, has such a property in the personal estate of the deceased, and such authority over his personal rights, that his acts are of such validity that they shall bind the executor who succeeds him. And this I strongly infer from the statute, which requires such administrator to return to the court his proceedings. And this is required that the court may know how far he hath administered, how far he is liable to be charged, and how far such executor may be exempted from liability by reason of such former administration. If, then, this position be correct, how does this case stand? For I presume it will not be denied that when administration is granted to a person who is the debtor (by bond, for instance) of the intestate, that the amount becomes merged, and the amount due upon it is chargeable upon the administrator as so much assets in his hands. It must be merged from necessity, for assets, to that amount, are, in truth and in fact, in his hands, and the bond can only be referred to as evidence of the amount. The administrator can not bring suit against himself. The making of him administrator is the act of the law, and the merger of the bond is the effect consequent upon that act. Now, when Elihu Bigelow administered upon the estate of Oliver Bigelow, deceased, this bond came into his hands. It became a debt which he owed unto himself, because the obligor and obligee were united in one and the same person. Yet if he failed to account for this sum, he was liable, either to the executor who succeeded him, or to the creditors of Oliver Bigelow, upon a *devastavit* (see also Packman's case), or upon his administration *bond. So did he consider it when he charged himself [146

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with the amount due upon the bond in the inventory which he returned to the court; and so was it considered as well by the court as himself, when he petitioned, under the "act providing for the execution of real contracts in certain cases," for a completion of this contract. The court were satisfied that the bond was paid, because they knew that the money was in the hands of the only person then known who was entitled to hold this bond, or who had the property of it. Upon this the court was authorized to declare, in the minutes of its proceedings, that it was satisfied that the bond had been paid, and to direct a person to make a deed pursuant to the contract. This was the situation in which the plaintiff, as executor, found the estate of his testator, when it came to his hands, after the partial administration of Elihu Bigelow. And if the position which I endeavored to establish in the foregoing part of this argument be true, that the executor, in a case of this kind, is bound by the acts of his preceding administrator, then the bond in this case was so merged that the present action could not be maintained upon it, and the verdict should be set aside. It is not important to this inquiry to determine how far the defense upon which the present defendants rely, would have been waived, if they, as the personal representatives of Elihu Bigelow, deceased, had, ignorant of the law, voluntarily surrendered to the present plaintiff the bond in question; for the jury have found that it was obtained by him without the consent of Elihu, or of his administrators, so that no right has been waived—no defense abandoned. It was argued at bar, that were the bond in this case merged, it would destroy the lien of the heirs of Oliver to the land. But what is the nature of that lien? In all cases of this kind it may be extinguished by the act of the administrator. For as soon as he receives the whole amount of the purchase money, equity declares the lien to be at an end, and decrees a conveyance of the legal title to the obligee. And the law will not studiously support a bare right that is attended with neither advantage nor value. The bond is the property of the executor or administrator, and though the legal title be in the heirs to strengthen their lien, yet he may at any time extinguish and forever defeat it.

147] *By the COURT:

The first question made is, whether the appointment of a debtor

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administrator extinguishes the debt, and *eo instanti* turns it into assets.

Secondly. If the debt is only suspended, whether the application for a deed by the administrator to himself, as obligor, and an order granted, destroy the right of action on the bond.

In this case, it appears that during the lifetime of Oliver and Elihu Bigelow, they entered into articles of agreement, by which Oliver covenanted, upon the payment of a certain sum of money by Elihu, to execute a conveyance for a tract of land therein specified. A part of the money was paid in the lifetime of Oliver. Administration on his estate was granted to his brother Elihu.

It is now a well-settled principle that if a creditor make his debtor executor, it is not absolutely an extinguishment of the debt, but remains as assets in his hands. *Dorchester v. Webb*, Croke Car. 372. It is, however, *quasi* a release at law, because he can not be sued. 1 Com. Dig. 337. The same rule must apply to administrators who can not sue themselves any more than executors. Both are trustees; the one under the law, the other by the appointment of the testator. In the principal case, a will was discovered and admitted to probate, and the administrator was superseded by the executor. Counsel suppose the debt or duty was only suspended, while the debtor was acting as administrator, and that a right of action immediately accrued to the executor when the bond came into his possession. The law appears to be otherwise. Personal actions once suspended are always suspended. Croke Car. 372. If the bond was once assets, no act of the parties could turn them back to an obligation. Chief Baron Comyn, who is himself said to be an authority, has recognized the principle as a sound one that a personal thing suspended is extinct. 1 Com. Dig. 337. The principle under consideration was decided in *Winchop v. Basset et al.*, 12 Mass. 199, the court says, "the executor having voluntarily assumed the trust, which prevents any one from suing, and being unable to sue himself, he shall be considered *as having [148 paid the debt, and as holding the amount in his hands as administrator." By the same case, securities in the bond were considered accountable for such assets. The discovery of a will, and the appointment of an executor, only operate as a repeal of the grant of administration, which did not avoid all mesne acts. A repeal upon citation, although the goods were sold *pendente lite*, does not render the act void. Croke Eliz. 458; Salk. 38. Consequently the applica-

tion, on the part of the administrator, to have the contract specifically executed, and the record of proceedings under it, are not rendered void by the discovery of a will and the appointment of an executor, who accepted the trust. Every act of the administrator has the same validity as if he had not been superseded, but had continued to perform his duties until final settlement and distribution of the estate. But the record of the proceedings, upon the petition of the administrator for a deed, is conclusive against the right of recovery in this action. The court had jurisdiction, and have found the payment of the money, which can not be controverted, unless this order or decree is void, and this is not pretended; it, being a solemn judgment of a court of competent jurisdiction, is no longer open for controversy. The decree can not be open for inquiry, whether the obligee made payment or not. The court has already adjudged that, and the record shows it. A judgment of the law is not to be controverted by collateral matters, for they are intended. 6 Cok. 38; 11 Mass. 227; Jackson, ex dem. Goforth, v. Longworth, 4 Ohio, 129. We can not in this collateral way go into an inquiry concerning the propriety or impropriety of extending the equity of the statute to an obligee who is administrator. The policy of admitting a trustee of the law to make this application, where his personal interest must come in conflict with his representative duties, would, as an abstract principle, be very questionable; but the decision has been made, and in this action can not be controverted.

The legal maxim, *omnia præsumuntur rite et solemniter esse acta, donec probitur in contrarium*, applies with force to this as well as to every other record. The court are of opinion that the facts agreed are conclusive against the plaintiff's right of recovery upon this [149] bond. Circumstances *may exist which enable the heir or creditor to be relieved against the effect of this order or decree, by applying to a different jurisdiction.

Judgment of nonsuit.

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JAMES AND THOMAS TAYLOR v. JOHN McDONALD.

Where one of several contractors is a resident of the state, and the others non-residents, an attachment can not be sued out and maintained.

THIS was a writ of error adjourned here for decision from Jefferson county.

The record shows that on May 23, 1826, the defendant in error sued out of the court of common pleas of Jefferson county a writ of attachment against William H. Hayes, John Pheeham, David Adams, Thomas Taylor, William Fitsrammons, and James Taylor, as non-resident debtors. To the writ the sheriff returned he had attached a section of land, the property of James Taylor and Thomas Taylor; at the return term the first default was entered, and an order of notice, agreeably to the provisions of the statute. At August term, 1826, the second default was entered, and the notice proved. On the 14th of September following a declaration was filed, reciting the issuing of the writ, the sheriff's return, and then avers, "that, whereas, Thomas and James Taylor, together with the said Hayes, Adams, Pheeham, etc., trading under the name and firm of the Pittsburg Iron Company," etc. At November term a third default was taken. The defendants, without putting in bail, pleaded in abatement, in substance, that Pheeham was, at the time the writ was sued out, and still is, a resident of Ohio, to wit: at Wellsville, in the county of Columbiana. The truth of the plea is verified by the oaths of the defendants in an affidavit subjoined.

General demurrer to the plea and joinder.

At October term, 1827, the plaintiff says he will not further prosecute his suit against Pheeham, because he is ascertained to be a resident of the state. And thereupon the court adjudged the plea in abatement insufficient and *respondeat ouster*. *On Decem- [150
ber 31, 1827, the defendants, except Pheeham, pleaded *non assumpserunt*, and filed an affidavit of its truth, etc. Subsequently, on motion of the plaintiff, and it appearing to the court that no property of the defendants, except Thomas and James Taylor, had been attached, leave was given to enter a *nolle prosequi* against all except the Taylors. By agreement either party had leave to amend. On May 15, 1828, the plaintiff filed an amended declaration, reciting all the previous proceedings, and further, "that, whereas, the

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said Thomas and James Taylor, together with Hayes, Pheeham, Adams, etc., late partners, etc., promised, etc." To the amended declaration the defendants pleaded the general issue, and filed an affidavit. The defendants moved to strike the cause from the docket, because the writ issued on a joint liability, and the plaintiff, as to several of the defendants, has dismissed his suit. The motion was overruled. The defendants also moved for a nonsuit, which was overruled. The jury impaneled returned a verdict for the plaintiff below of one thousand four hundred and forty-seven dollars and thirty-one cents. Judgment upon the verdict and an order for the sale of the property attached. Among the many errors assigned, one was that the court ought to have adjudged the plea in abatement as sufficient, and the judgment of the court being founded upon this error, it is deemed unnecessary to notice the others.

MARSH, for plaintiffs in error:

In arguing the validity of the plea in abatement, the counsel for the plaintiffs in error do not consider it necessary to determine what the law would have been, had the attachment, in this case, been issued against non-residents only. The case would certainly have been entirely different, in every aspect in which we can view it, had the fact that a resident of this state was one of the partners in the Pittsburgh Iron M. Company been first disclosed by a plea in abatement, for want of making all the members of the company defendants in the writ. Here the writ is issued against the property of one who, by the subsequent pleadings, is admitted to be a resident of this state. The affidavit, on which the writ issued, must have stated that Pheeham was a non-resident.

151] *This is a statutory action, and the terms of the statute must be strictly complied with. 2 Ohio, 229. This being an action on a joint contract, must be sustained against all those who are made defendants, and who are set forth in the declaration as joint contractors. The parties have a right to insist on performing the contract in the same manner in which it was made. Any one or more, who are sued, have a right to insist on the other joint contractors being brought before the court, to assist in the defense. Hence the plea in abatement that another, not sued, contracted jointly with the defendant. Clearly, then, if the one defendant, when sued alone, could compel the calling in the other

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to defend with him, the plaintiff can not, when he comes into court, dismiss one of two defendants, sued on a joint contract, without dismissing both. As to the idea of bringing him back again, by a plea in abatement, it is idle; for of what use to *compel* the plaintiff to call in a party whom he may again dismiss the next day? But it is considered unnecessary to defend the position that, in an action on a joint contract, *commenced* by personal process, the plaintiff, if he found that he had made too many persons defendants, could not *non pros.* his suit as to a part of the defendants, and go on as to the others. 1 Com. Dig. 80; 1 Wilson, 89; 1 Saunders, 207, note; 2 Tidd, 632; 5 Burr. 2614. But it will, perhaps, be contended that this statute has changed the law in that respect, and that the defendants could not plead in abatement the non-joinder of other joint contractors in a writ of attachment under this statute. The statute does not appear to us to have made any *alteration* in the law in this respect; but even if it had, it is conceived that as this case is it could make no difference. The fact of the liability of Pheeham is shown by the plaintiff himself, by his affidavit, and writ, and declaration, and it is only the fact of residence which is disclosed by the plea. The plaintiff himself has brought him into court, and declared against him; and the contract being joint, he can not any more *non pros.* his suit, as to him alone, after appearance by the defendants, than if the suit was commenced by summons. The plea in abatement is clearly good as to Pheeham. This point was expressly decided in *Hartshorn v. Wilson*, 2 Ohio. Is it not, then, a good plea for the other defendants? It is conceived *that it is, for the reasons before stated, and also for another reason. This statute clothes the court with limited and defined powers, which it can not exceed, but must strictly pursue. The court of common pleas, acting under this statute, sits as a court of limited jurisdiction. If any of the parties made defendants are not subject to the jurisdiction of the court in this form of action, the court *can not* take jurisdiction of the cause. Here one of the defendants was not liable to the attachment, and therefore the writ should have been quashed for want of jurisdiction. All the joint contractors make but one debtor. In the case of *Strawbridge et al. v. Curtis et al.*, 3 Cranch, 267, the court expressly decided that to give a court of limited jurisdiction power to entertain jurisdiction where the interest is joint, each of the persons composing a party, plaintiff or

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defendant, must be competent to sue, or liable to be sued, in that court. This authority is certainly decisive of the case before the court. I know the court will be told that the thirteenth section of the statute obviates this objection. It will be borne in mind by the court that this statute, creating a new *jurisdiction*, in derogation of the common law, is to be construed strictly. 2 Ohio, 229. The language of the thirteenth section of the act can not be extended beyond its plain and obvious import, to deprive the defendants of their right to plead in abatement the want of parties. The language is, that "the writ of attachment, provided for by this act, may be issued against the separate or joint estates, or both, of such joint debtors, or any of them." This is directory as to the form of the writ, with reference to the property to be attached only, and not as to who are to be made *defendants* to the action. This is manifest, from the consideration that the writ is to be in the alternative, to attach the property of the defendants, or that of any of them, or property of both descriptions. And it is submitted to the court that on a writ of attachment, issued, as this is, without any command to attach the several property of one or more of the defendants, the sheriff would not be justified in seizing any other than the property of the company, and that, in this *respect*, this attachment is not well executed. This section evidently contemplates that all the joint obligors or partners should be included in the writ, and that they must all be liable to [153] the attachment, *to authorize the writ to be issued against the *partnership* property; because, if any one of them is within the reach of personal process, the partnership property may be subjected by the ordinary process of the court, and extraordinary process shall never be resorted to but where the ordinary process is unavailable. If this view of the subject be correct, and it is thought that it will not be controverted, it must be *decisive* of the case.

J. C. WRIGHT, for defendant:

The appearance of the Taylors at the August term, 1828, or before, and their plea then, was, as to them, a waiver of all irregularity in the process and previous proceedings. It is a point well settled that appearance and plea to the action is an admission by the defendant that he is properly in court, and he is not allowed afterward to object prior irregularity, in proceedings whose only

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object was to bring him into court to answer. As the general rule, it is presumed this rule will not be disputed. These proceedings are under the attachment law; and we must look to its provisions, and see if, in this respect, they vary the general rule, or create an exception from it.

The foundation of the proceeding in attachment is the absence of a debtor out of the jurisdiction of the court, either *absconding* or *as non-resident*. Upon affidavit by plaintiff that his "debtor is not a resident of the state," the writ issues to attach the lands, etc., of the debtor wherever found. It is a proceeding *in rem*, while *ex parte* as to the attached property, but may be changed to an adversary proceeding, at the option of the debtor. He may perfect an appearance by entering special bail to the action, or rendering himself in custody, and be held to plead; or he may do so without special bail, leaving the attached property instead of special bail; and whenever his appearance is perfected, either in one way or the other, he may *plead to the declaration*, and thenceforth the cause proceeds in the same manner as if the debtor had been brought into court on a *capias*, and had perfected his appearance, and plead to the declaration. Could he, in such a case, look back of the *narr.*, and plead to the writ in abatement? That will not be claimed. The statute confers *upon absconding [154 and non-resident debtors the right, without appearance, where the proceedings are *in rem*, to move to quash, or make objection to irregularities in the writ, etc.; but in such cases the objectors are regarded as mere *amici curia*, to inform the consciences of the judges in a case *ex parte*, where the proceedings are always *stricti juris*. But such is not the case at bar; it is adversary, and the defendant has plead to the declaration in bar. The defects in the writ are cured by such plea. The writ of error can only embrace errors in the declaration, subsequent proceedings, and judgment. If I am correct, and I think it clear, all objection to these proceedings, that the court erred in the plea in abatement, or in overruling the motion to quash the writ, are answered by the reply that they are anterior to the plea in bar. If the party had a right to the plea or motion, and the decision was adverse, he should have rested there, and prosecuted his writ of error, and not have waived those errors at the time, in the expectation of bringing them up again. This remark applies to the *non pros.* of the plaintiff, as to all the defendants in his original process but the Taylors; that

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was prior to the filing the *narr.* against them alone, and waived by the plea to the *narr.*

M. D. COLLIER also submitted an elaborate argument for the plaintiff, upon points not touched in the opinion.

By the Court:

We have recently decided that the statute, regulating attachments, has left the parties to the suit and the pleadings to the law governing the action in other cases. But another question is now to be determined, namely, whether in the proceeding against parties jointly liable, all the defendants must either have absconded, or be, at the time the affidavit was made, non-residents. The remedy by attachment exists principally *in rem*. The party, in contemplation of the statute, is not in court when his property is seized, and the notification, which is substituted for personal service, is generally ineffectual to give the debtor information of the pendency of the action. This proceeding gives the creditor an extraordinary advantage, at its inception, over the debtor. 155] *Besides dispensing with personal service, the statute gives a lien upon the property of the defendant from the service of the writ. The property, if perishable, may be sold before the rights of the parties have been judicially determined, and is held in the custody of the law, to satisfy the judgment that may be recovered. The rights and credits of the debtor are also brought within the control of the creditor by this process. These very important consequences, which are unknown to our general course of jurisprudence, flow from this process. This remedy, being nearly *ex parte*, and not according to the course of the common law, ought not to be extended beyond the letter of the statute. Colwell, Adm'r, v. The Bank of Steubenville, 2 Ohio, 229. Where the creditor proceeds by attachment, the statute does not authorize him to dispense with the parties to the contract, either in the declaration or subsequent proceedings, and it is not in his power to omit one of two or more joint defendants, without incurring the danger of the suspension of his remedy, by a plea in abatement.

The court might be justified in extending the equity of the statute to a case like the one under consideration, if the creditor was wholly remediless at law, without such construction; but a less

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dangerous and more just remedy, one in strict conformity with the general policy of our law, is given by the act "providing for the service and return of process in certain cases." This act provides that, when a writ is returned served upon one or more defendants, it shall be lawful for the plaintiff to file his declaration against the one in court, suggesting therein the return as to the other defendants, and proceed to judgment as in other cases. The defendants not served, if necessary, can be made parties to the judgment by *scire facias*. This statute furnished the plaintiff below with the ordinary means of securing and collecting the debt. It is no argument to say the process of attachment is more expeditious in creating a lien upon the defendant's property, which is at once taken into the custody of the law to be held subject to the future judgment. There can be neither justice nor equity, in furnishing one creditor with a lien upon the debtor's property, real and personal, from the service of the writ, and leaving another, with a claim perhaps more meritorious, *to the tardy [156] remedy of ordinary proceedings, and to bind the property by a judgment in his favor.

The remedy by attachment is an extraordinary proceeding, for the writ seizes and binds the property of the debtor before the claim of the creditor is judicially ascertained, upon the mere affidavit of an interested party.

It can not be tolerated, unless the creditor brings himself strictly within the provisions of the statute. It would, indeed, be a singular exposition of this statute, to give the creditor an action by attachment against an absent partner, without allowing the resident one even a day in court to controvert the justness of the plaintiff's demand. The partners being equally interested, in the consequence of the suit, there is an obvious fitness in permitting litigation with the one present rather than with him who is absent. The court will never proceed *ex parte*, or upon notice, which, in general, is not much better, unless it is the only alternative of the creditor. When there is another remedy, according to the course of the common law, although it may admit of more delay, or, in some respect, be less advantageous to the creditor, it ought to be pursued, especially if a contrary course would lead, in the nature of things, to uncertainty and often to injustice.

The court are clearly of opinion that a creditor is not authorized to resort to process of attachment, when there are joint liabilities,

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without all the defendants are non-residents, or have absconded. So long as one joint contractor remains within the jurisdiction, who can be personally served with process, the creditor must seek his remedy in the mode pointed out by other statutes.

The court below, therefore, erred in overruling the plea in abatement of the defendant, for which the judgment is reversed.

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Bond to the commissioners of the county, no commissioners being elected when the bond is made, covenanting to lay down water-pipes to convey water to a town, and for securing the use of such water to the inhabitants of the town, can not be considered as a grant of the use of the land in which the pipes are laid.

THIS case was adjourned here for decision from the county of Wayne. It was an action of trespass, and stood upon a case agreed.

The defendant entered upon the premises, by order of the corporation of the town of Wooster, to repair certain conduits laid through the lands of the plaintiff. The facts agreed are as follows: On May 13, 1811, John Beaver, William Henry, and Joseph H. Larwell, proprietors of the town of Wooster, in the county of Wayne, executed a bond to the commissioners of said county that thereafter might be appointed or elected, and their successors, in the penal sum of seven thousand dollars, with a condition "that if the above-bound obligors, or either of them, their heirs, executors, or administrators, do well and truly perform, execute, and erect the following labors, conveyances, buildings, etc., as hereinafter specified, to wit: erect a court-house, etc. And further, said obligors do bind themselves as aforesaid to bring the water of the run, which at present runs through the town from the north, in pipes of sound white-oak timber, well bored and laid, and raise the water therefrom, on the center of the diamond of said town, at least ten feet above the surface thereof, and that the same shall forever remain free and clear of all incumbrances for the use, benefit, and convenience of the inhabitants of said town, and they

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have the privilege of conducting the same from thence in pipes, and raised in pump stocks, to any other part, etc., of said town," etc. On April 6, 1812, commissioners of Wayne county were elected. Joseph H. Larwell, one of the above proprietors of the town, held, on April 6, 1812, an equitable title to part of the land upon which the trespass is alleged to have been committed, and on May 10, 1813, acquired a legal title, and conveyed to Sloane by deed dated July 3, 1820. The other part of the premises were conveyed by William Henry and Joseph H. Larwell to John Beaver, and by Beaver to the plaintiff. Neither of these deeds contains any reservation whatever, except the one from Larwell and Henry to Beaver, which reserves from use and cultivation two rods on each side of the spring branch, from *the north side [158 of the quarter section to the place where the water had been taken out for the use of the town of Wooster. Through both tracts the conduits were sunk under ground by the obligors in 1814. Sloane has never been an inhabitant of the town of Wooster, and both the tracts lie without the town plat and corporate limits. Wooster was incorporated in 1824, and in 1827 an order was made by the common council, directing the defendant to contract for and superintend the repairs of said conduits. By virtue of this order the defendant entered into the land, which is the trespass charged in the declaration. If the court are of opinion that, under these circumstances, the plaintiff is entitled to recover, judgment is to be entered for the plaintiff with five dollars damages; if otherwise, a general judgment for the defendant.

J. C. WRIGHT, for plaintiff:

The right of the plaintiff to recover, in this case, is admitted, unless the facts in the defendant's notice, and in the agreed case, justify the trespass complained of.

The defendants rely on a bond executed by Beaver, Henry, and Larwell, May 13, 1811, in the penal sum of seven thousand dollars, in which they became bound to the "*commissioners that hereafter may be elected or appointed for the county of Wayne,*" etc., conditioned among other things (the seat of justice being permanently fixed in the town of Wooster), that "said obligors do bind themselves as aforesaid to bring the water of the run, which at present runs through the town from the north, in pipes of sound white-oak timber of a proper size, well bored and laid, and raise the water

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therefrom, on the center of the diamond of said town, at least ten feet above the surface thereof, and that the same shall forever remain free and clear of all incumbrances, for the use, convenience, and benefit of the inhabitants of said town, and that they have the privilege of conducting the same from thence in pipes, and raised in pump stocks, to any other part or parts of the town aforesaid, as may be deemed necessary and proper for their convenience, to be regulated by a majority of said town." They there also obligate themselves to convey certain lots, etc., for an academy 159] and house of *public worship. That the said bond was delivered to Wright, one of the commissioners to fix the seat of justice in said county, for the use of those interested, etc. That the town of Wooster was incorporated in February, 1824, and the trespass complained of, were acts (laying down pipes, etc.), done in pursuance of a resolution of the corporation of July, 1827. In appears, also, that when this bond was dated, Larwell owned the equitable interest in a quarter section, including the land of the plaintiff, and obtained the legal estate by patent, from the United States, in May, 1813. While Larwell held the fee in 1814, pipes were laid through the land now held by plaintiff, beneath the surface of the ground. Larwell conveyed two-thirds to Henry and Beaver, and afterward Henry and Larwell, July 13, 1813, conveyed the part now owned by plaintiff to Beaver, and Beaver to Sloane, on December 27, 1815, without any exception of said water right, Sloane then living in Stark county, where he resided at the date of the bond. In the deed from Larwell and Henry to Beaver, there is a reservation from all use and cultivation of two rods on each side of the spring branch, "to the place where the water had been taken out." In the other deeds there is no reservation whatever; and the reservation above is not on the land of the plaintiff, where the trespass was committed. The said premises held by plaintiff are not within the limits of the corporation of Wooster.

The county of Wayne was designated, as to its boundaries, in the act of February 13, 1808. Vol. vi. 155. Commissioners were appointed to fix the seat of justice January 22, 1811. Vol. ix. 92. Their duties were "to examine and select the most proper place as the seat of justice, as near the center of the county as possible, paying regard to the situation, extent of population, and quality of land, together with the general convenience and interest of the

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inhabitants." Vol. viii. 463. The county was organized March 1, 1812. Vol. x. 17. The bond was taken possession of by the county commissioners, and recorded in the proceedings of the commissioners, and nowhere else.

1. Is this paper, purporting to be a bond, *valid*, and, if so, who are bound, and who authorized to enforce it as obligees? I contend that to constitute a *valid* bond, there must be parties, obligors of ability to enter into it, and obligees capable of receiving. Who is the obligee in this bond? No natural person, nor any legal person. The commissioners hereafter to be elected or appointed for the county of Wayne, is not a designation of any natural persons certainly. As to the county of Wayne, it was not then in being, nor until the 1st of March thereafter, ten months. The first commissioners were not to be elected until April, 1812, eleven months after the date of the bond. It is then a nullity. But suppose the objections as to parties were removed. Who are capable of availing themselves of the obligation, and what is its nature? The bond declares the obligation to be for the use of the county of Wayne, to be discharged on the bringing the water to the center, elevating it there ten feet, there to remain free forever. This, if valid, is a personal covenant of the obligors to and for the county. It is not subject to the control or action of the town. The right of the town only commences when the water is brought to the center, and maintained there at the proper elevation. The inhabitants have the right to the free use of the water at the center, and the privilege of conducting the same from thence in pipes; the manner to be regulated by a majority of said town. The obligors bind themselves to the county to keep the water at the center, and then the right of the inhabitants attaches. The covenant purports to grant nothing, but to forfeit the penalty for non-performance; no right under it is vested in the town; it can not enforce it, nor sue or provide penalties for interrupting it before the water is within the town, and free for the use of the inhabitants.

2. It is claimed for the defendant that it is an appropriation of lands for the public use, of which the plaintiff is bound to take notice, and by which he is bound. Is this so? The fourth section of the eighth article of the constitution secures the inviolability of private property, except taken for public use, where a compensation is made to the owner. I know of but two ways in

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which, in Ohio, lands may be appropriated to public use. One by the act of the owner, either by express grant, or by implication, the party owning and showing his intention to appropriate; the other by legislative enactment, and the strict pursuit of the provisions of such enactments. Of the first class are the streets, alleys, and public grounds in a town. By the act of recording [161] *town plats, vol. xxii. 301, maps, or plats of towns, before any lots are offered for sale, are required to be recorded, and "shall particularly set forth and describe all the public ground within such town, by its boundaries, corners, and extent; and whether it be intended for streets, alleys, commons, or other public uses," etc.; and all the lots shall be numbered, and their precise length and width stated, "and the map so made and acknowledged (as deeds are) and recorded, shall be deemed a sufficient conveyance to vest the fee," of the lands expressed or intended for public uses, in the county in which the town lies, in trust for the uses intended, and for no other use whatever. Of the second class are lands taken, the usufruct to the public, for roads, where the proceedings are on public notice, on petition, and the order of the commissioners, affording the owner an opportunity to claim his damages, etc. It can not surely be pretended that this bond, and the proceedings under it, comply with the provisions of either of these laws, and I am not able to see how this is to be sustained as an appropriation for public uses. The case of the Town of Pawlet v. Clark et al., 9 Cranch, 292, has heretofore been relied on for the defendant. I do not see the application of this case. The Supreme Court there determine (p. 325), "that a donation to the church of England is not good, for no such corporation exists in legal contemplation." This does not sustain the defense; if it bear on the case, it negatives the idea of an appropriation. In page 331, they recognize the principles of the civil law in regard to donations for pious uses, and that a donation by the town to a non-existing parish church would, therefore, at common law, take effect, as a dedication to pious uses, which it would be incompetent for the town to resume, and the fee, contrary to the general principle of the common law, would be in abeyance to take effect as a grant where the parish church was established, to which the crown would be deemed the patron. The origin of these grants for pious uses, and the reasons inducing courts to construe such grants, without a grantee, as renunciations by the crown, which it

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could not resume, it is not my purpose to examine. But it is remarkable that in the very case where they determined as above, the court recognized the act of the State of Vermont, which, by the revolution, had succeeded to the rights of the crown *as [162 conveying a legal estate in these glebe lands to the town in which they were situated, although it said the crown could not resume such donation, and the title was in abeyance. In that case, however, there was a grant from the king before the revolution, and from the State of Vermont after. The two cases have no analogy, unless it be insisted for the defense that Larwell & Co., as proprietors of the town of Wooster, were invested with legal power in reference to the subject of the grant. The case of Gwynn and wife v. City of Cincinnati, 3 Ohio, 25, has also been adverted to as supporting the claim of the defendant. In that case a deed had been made, by the husband by a former marriage, in his lifetime, for ground for widening a street, and by agreement with the city council for opening a street subject to the same public regulations as the grounds originally laid out in streets; but the spot on which a market-house was erected in the tract had been omitted in the deed, and dower was claimed in it. The court held that inasmuch as the use for which the property had been set apart by the owner was inconsistent with the exercise of any private right, the dower was suspended or abrogated during the continuance of the use, and very properly put the case on the footing of originally designated streets, etc., on town plats recorded. It will be remarked that here was an express description of the appropriation by the owner, as in the making a town plat, and in neither does the law require the wife to unite.

3. Will it be urged for the defendant that the bond in question is a *grant*? It has none of the requisites of a deed, as known to our laws. There is no grantee, no consideration expressed, 3 Johns. 484; no *acknowledgment*, nor any requisite of the ordinance of Congress, or the acts of the Ohio legislature. Neither the county, the county commissioners, or the town, were incorporated, and no one named capable of taking any grant. The case of Cooper v. Cory, 8 Johns. 385, was ejectment. The plaintiff having shown title, the defendant exhibited a *deed* from plaintiff to the people of the county of Otsego for the premises, and a deed from the supervisor of the county, made under an act of the legislature of New York, authorizing the supervisors to sell the court-house

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and jail, and the lot on which they stood (the one in question). 163] It was held that the people of the *county had not capacity to take any grant, not being a corporate body known to the law. See also 2 Johns. Cases, 324. In the case of *Lynch v. Hartwell*, 8 Johns. 422, the supervisors (who, in New York, perform the duties of our county commissioners) having agreed upon certain lots for a court-house, etc., in the town of Rome, for Oneida county, in order to promote the settlement and embellishment of the village, and in consideration of one dollar, took a grant for certain lots for said house, etc., to be held by them and their successors forever, in trust, to erect a court-house, etc., thereon, and to permit part of the premises (described) to be appropriated for a church and school-house, under the direction of a *majority of the freeholders* of Rome, for the use of the inhabitants, etc. The court held that, admitting the first part of the grant for the use of the county good, the other for the *use of the inhabitants of Rome* was bad, because the supervisors being a corporation for limited purposes, were incapable to take in trust for the use of an individual, or others foreign to the *purpose of their institution*, and the grant was "*deemed void upon every principle.*" It can not, I conceive, be successfully contended, that the commissioners appointed to fix seats of justice in Ohio are a corporation for any purpose whatever, nor that our county commissioners are a body corporate, for any more general purpose than the supervisors in New York. The duties of our commissioners may be found in vol. xxii. 266. Their powers are *enumerated* in the act of assembly, and that of taking in trust for any other purpose is not mentioned or conferred. The case of *Hornbeck v. Westbrook*, 9 Johns. 73, is also in point. A tract of land had been conveyed to the plaintiff, with a reservation proviso, that the inhabitants of Rochester should be allowed to cut and carry away wood from any part of the land not in fence. The defendant, an inhabitant, was sued in trespass, for cutting and carrying away wood, and relied on the proviso in the deed as a justification. It was adjudged that the proviso in the deed was void—the inhabitants of a town, not incorporated, were incapable to take an estate in fee, and a grant to them would have been void for uncertainty; and if incapable to take by that name, a reservation to *them*, in a deed to a *third* person, was void. The court lay it down, as acknowledged law, that a person, not a

164] party *to a deed, can not take anything by it, unless by

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way of remainder; and that a grantor can not covenant with a stranger to a deed. Carthew, 76; 8 Coke, 69.

The same question came again under the consideration of the Supreme Court, in New York, on the same proviso, in *Hornbeck v. Sleght*, 12 Johns. 199. This was also trespass for cutting wood, etc., and the proviso is set out in *hæc verba*, as follows: "Provided always, that the inhabitants of the said town of Rochester may have allowed sufficient roads, and outways, over the said tract of land, and to take, cut, and carry away wood and stone from off any part of said land which shall not be in fence." The court confirmed the case of *Hornbeck v. Westbrook* above, and again declare the reservation void. "Nor would it be valid (say they), as a covenant to stand seized. The inhabitants of Rochester were strangers to the deed. The present inhabitants, at all events, must be so considered. For they, not being a body corporate, so as to perpetuate the rights granted by the patent, these rights must be restricted to the then inhabitants." This "deed, and all its provisos and reservations, must receive the same construction, and be governed by the same rules, as the deeds of other individuals." Upon these authorities, and upon principle, I suppose it clear the paper relied upon is no grant. It has no requisite of a deed known to our laws. I can not better close this point in the case, than by adverting to the decision of the Supreme Court of the United States, in the case of *McCormick v. Sullivan*, 10 Wheat. 202. In that case, Judge Washington, in giving the opinion of the court, says: "It is an acknowledged principle of law, that the title and disposition of real property is exclusively subject to the laws of the country where it is situated, which can alone prescribe the mode by which a title to it can pass from one to another." The judge cites, as sufficient for his position, 7 Cranch, 115; 9 Wheat. 565.

4. This bond can not be viewed as a covenant to stand seized, or as running with the land. At the date of the writing, the obligors were not seized of the land, and could not so covenant. If they had been so seized, we have seen, in the cases cited, that to such a covenant there must be a party to the instrument, capable of taking—such a covenant would be void, if made in favor of a stranger. In the case *at bar* there is no covenantee, [165 and the pretended reservation is not, indeed, to a stranger, nor yet to a privy. It is to a nonentity.

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5. Is this bond available to the defendant as a license? The case of *Sullivan v. Commissioners of Franklin County*, 3 Ohio, 89, has been averted to. I am unable to see its application. In that case, Sullivan, who held the fee, had conveyed to the commissioners of the county, "on the express condition, and no other, that the jail, or prison-house, when built, shall be built on said lot." The jail has been built on the lot, and was used as such when the suit was brought. The deed was found defective as a grant, because it had no subscribing witnesses. There were parties to the deed, an obligor and obligee, and the court held, that although the paper wanted the requisites of a deed, it had those of a written license to enter and occupy lands, and that a possession under a license was a good defense in ejectment.

6. A question arises here, connected with this matter, in either aspect; that is, whether the plaintiff does not stand before the court in the light of a purchaser *without notice*. Even if the estate in the town should be adjudged legal, yet the record on the commissioners' books alone is no legal notice to a subsequent purchaser. If the fact of the plaintiff signing the bond, as a witness, be relied upon, I reply that is but a circumstance, and all our experience is adverse, from the assumption that the witness is made acquainted with the contents of the paper witnessed. Such information is seldom communicated, and it would be impertinent to ask it. The witness observes the signature, or hears the acknowledgment of the party, and attests it, and recollects that fact when his attestation is again shown. The matters of the deed are never intrusted to his memory. If the plaintiff read, or was acquainted with the contents of the bond, that is a fact for the defendants to prove. There is no such evidence. Did he know of the logs laid when he purchased? There is no evidence of the fact. He resided out of the county always, until long after the date of the conveyance to himself.

7. If this bond is valid for any purpose, it could be only to those who inhabited the town of Wooster at its date. If any one 166] was capable of taking anything, it was only they, *and a majority of them alone could control. Here the corporation has intervened, embracing more territory and inhabitants than existed at the date of the bond; and the corporation agents seek to exercise the power of the majority of the old inhabitants, when perhaps, every one of those opposed their election. Besides, if

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the corporation had power, it could only be within their limits, and this ground is admitted to be without the corporation.

GEO. JAMES, Esq., also submitted an elaborate argument for the plaintiff, which is too long for insertion in the reports.

AVERY and SILLIMAN, for defendant:

For the defendant it is contended:

1. That there is no legal grantee.

2. That the bond or article of agreement made by Beaver, Henry, and Larwell is not such a grant of the right as will bind the contracting parties, or those who claim under them.

As to the first point, it is not necessary for the defendant to contend, that there was in being at the date of the article of agreement such a legal grantee as could have taken a fee, nor do we contend there was any alienation of the fee in the land. But it was merely an appropriation or dedication of the use to the public—we contend that no grantee was necessary. In the case of the Town of Pawlet v. Clark and others, 9 Cranch, 292, the Supreme Court of the United States decide that no grantee is necessary to support an appropriation or dedication to public uses.

As to the second point, we do not contend that the commissioners of the county of Wayne, elected after the execution of the article of agreement, or the inhabitants of the town of Wooster, took an estate in fee in any part of the land through which the aqueduct passed, and we admit that if the right to the use could not be given, without such a grant as would convey the fee, the plaintiff is entitled to recover; unless the act done by Beaver, Henry, and Larwell, by executing the article of agreement, and by constructing the aqueduct, was such a license to the inhabitants of the town *to enter and repair as could not be counter- [167]manded or discharged, either by the parties to the agreement, or those claiming under them.

If no grantee is necessary to support an appropriation or dedication to public uses, it follows of course that the same requisites are not necessary to support such appropriation or dedication as are required in the conveyance of a fee. In the case of Gwynn and wife v. The City of Cincinnati, 3 Ohio, 25, this court recognizes the doctrine that ground for public uses may be appropriated or dedicated without the formalities required in the conveyance of the fee. The

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familiar case of the appropriation of ground for a street or public highway, is one in which, although there is no particular grantee, and none of the modes necessary for the conveyance of the fee are observed, yet the public acquire a right to the enjoyment of the use, as much and as completely as if all the solemnities requisite in a deed for the conveyance of an estate of inheritance were observed, the grantee reserving everything not necessary for the enjoyment of the use.

It will be contended by the plaintiff that the cases cited from New York are decisive upon this question; but the court will observe that in most of those cases, *individuals* claimed the rights denied, and not the public generally, which, we contend, distinguishes this from those cases.

But we contend, at any rate, that the bond or article of agreement amounted to a license to enter and repair the aqueduct whenever the same should become necessary, doing as little damage to the soil as possible. By the agreed case, it appears that the natural course of the water was from the north into the town; and it will be admitted that neither Beaver, Henry, or Larwell, or any other person, could in any manner obstruct or divert its course. But for the better enjoyment of that right, a license is given to the inhabitants of the town to enter and repair, not the aqueduct originally laid by them, but which was done by the then proprietors of the town, and of the land on which the aqueduct was laid.

A license may be either in writing or in parol; and if resting in parol, and be part executed, it is not in the power of the person giving it to discharge and countermand it; and certainly so, if the license is in writing and partly executed. This point was adjudged in the case of *Winter v. Brockwell*, 8 East, 308; *Crosby v. Wadsworth*, 6 East, 602. We contend that the first construction of the aqueduct, under the agreement by Beaver, Henry, and Larwell, as one inducement by the commissioners to establish the seat of justice in Wooster, was such a part execution of the license as will inure to the benefit of the inhabitants of the town themselves. We do not rest our claim to part execution of the license on this ground alone. Under the order of the corporation, the defendant caused the logs to be taken up and repaired; and it appears from the case agreed, that these repairs were made by the defendant, without any objection having been made by the plaintiff.

It may be said that the inhabitants of the town acquired no right

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of entry to repair, by the express terms of the bond or article of agreement; but we maintain that if the appropriation or dedication of the use can be supported, the right of entry to repair is incident to the grant for the enjoyment of the use. *Ponfrit v. Ricraft*, 1 Saund. 323. In the case of *Sullivan's Heirs v. Commissioners of Franklin County*, this court has decided, that, although the deed from Sullivan was not sufficient to convey the fee, yet that as the possession accompanied its execution, it was good as a license, and afforded a good defense in an action of ejectment. If so, we maintain that there could be less doubt of it affording a good defense in an action of trespass.

As there can be no doubt of the intention of the parties to the bond or agreement, this court will, as we believe, protect the inhabitants of the town in the enjoyment of the privilege intended to be granted, unless such protection would be granted at the expense of established principles of law.

As the conveyance of the water into the town may have had great influence on the commissioners in fixing the seat of justice, and on those who afterward became purchasers of lots, if the license to enter, for the purpose of repairing, is not valid, a great fraud will be practiced on those who claim the right. We contend that when a license, either in writing or by parol, is given and partly executed, a court of equity will protect those for whose benefit it was given, in the enjoyment of it, by restraining the owner of the fee from doing any act to impair or destroy the right; and if so, the persons licensed, or those who claim under them, can not be considered as trespassers. [169]

By the Court:

This bond is not a grant, but a covenant. It contains none of the formalities which the wisdom of ages has settled as necessary to convey real estate. The covenant against incumbrance is an accidental phraseology, borrowed from the usual term in a common law conveyance, and can not, upon any principle, be construed into a grant. No acknowledgment appears upon the instrument; and this is made necessary by statute, in order to constitute a complete deed of conveyance. *Roads v. Symmes*, 1 Ohio, 281; *Lessee of Johnston v. Haines*, 2 Ohio, 55. But giving the conditions of this bond all the requisites of a grant, then the proprietor of the town granted, either to the commissioners of the county, or

Lessee of Lowry v. Steele and Phillips.

the inhabitants of Wooster. If the legal right of entry is vested in the commissioners, the defendant can not justify the trespass. He has neither showed a license nor order from them, to enter for any purpose. Besides, the commissioners of Wayne were not in being at the date of the instrument; the grant would therefore be void. It is indispensable to the validity of a grant, that the grantee be capable of receiving it; that is, that he be a person in being at the time of the grant made. A grant to him or her who is to be the first child of T. S. or to his right heirs, he being living, is void. Shep. Touch. 235. The same principle will apply to the unincorporated inhabitants of the town of Wooster, as to their capacity to be grantees. The instrument is dated in 1811. The town of Wooster was incorporated in 1824. A grant to the inhabitants of Wooster, admitting they were capable in law to take, would only vest the estate in joint tenancy in those who were actually such at the date of the grant. The tenancy could not be made to extend to others who, subsequently, became inhabitants. Upon the death of the inhabitants *in esse*, at the date of the deed, the right would either be in abeyance, or re-vest in the grantors. But the inhabitants could not be grantees, and a deed executed to them would be void. The authorities to [170] this point are *numerous and perfectly conclusive. 8 Johns. 301; 9 Johns. 73; 9 Mass. 419; Sugd. 388; Co. Lit. 3, a; 2 Com. Dig. 168. The inhabitants not being a corporate body, and being therefore incapable of taking an interest in land, by conveyance, at common law can not be *cestui que use*. Cruise, D, 413. If the county commissioners could be grantees, they could not be seized to the use of the inhabitants of Wooster. The facts and law arising upon them do not furnish a justification for the defendant. There must be a judgment for the plaintiff, according to the agreement of parties.

LESSEE OF FIELDING LOWRY v. JAMES STEELE AND HORATIO G. PHILLIPS.

Feme sole, in contemplation of marriage, grants a term of seventy-five years of her real estate to a trustee, in trust for her own use during the contemplated coverture. The marriage takes effect and she has issue, but dies before her husband. He is entitled as tenant in courtesy.

Lessee of Lowry v. Steele and Phillips.

THIS was an ejectment adjourned here for decision from the county of Hamilton. It was an agreed case, and the following are the material facts:

On January 14, 1822, Sophia Cooper was seized and possessed, in fee, as tenant in common, with Maria Grimes and others, of the premises in question, on which day, being of the age of thirty years, and *sole*, she made and delivered to James Steele, one of the above defendants, an instrument, a copy of which is submitted as a part of the case. The agreement so far as relates to this controversy, after reciting that Sophia Cooper was heir at law of Mrs. Zeigler, and that she held in-lots, etc., and that she contemplated a marriage with Fielding Lowry, sr., and in order that she might enjoy and have said lands, and the profits thereof for her sole and separate use, and that the same might not be subject to the control, debts, or engagements of her said intended husband, "for the consideration of one dollar, she grants, etc., to James Steele in trust, for and during the term of seventy-five years, without impediment of waste; that the said Steele shall every year during said term pay and deliver all the proceeds, rents, etc., unto such person, *and for such intents, as the [171 said Sophia Cooper shall appoint, and, in default of such appointment, then to be paid into her own hand, for her sole and separate use, etc.; and upon further trust, that Steele should transfer the premises, or any part, to such person as the said Sophia, by her writing and will shall appoint, and in default of such appointment then to the heirs of said Sophia. The term to cease upon the death of said Sophia or her intended husband." On the 23d of January, in the same year, the said Sophia was lawfully married to said Lowry. After the marriage, partition was made between the tenants in common, and the premises in question set off to said Sophia, as by the record of partition appears, a copy of which is also made a part of the case. After the partition, Lowry, in right of his wife, received the rents, etc., until her death, which took place in May, 1825. The lease, entry, ouster, and possession by the defendants are admitted. Mrs. Lowry died without appointment, leaving a son, issue of the marriage, and leaving other children by a former marriage, who claimed as heirs at law.

The only question submitted was, whether Lowry was entitled to possession as tenant by the courtesy.

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CASWELL and STARR, for plaintiff.

HAMMOND and GARRARD, for defendants.

By the COURT:

To entitle Lowry to courtesy, the only requisite of which there can be any doubt is, whether he was seized during the coverture? Steele was vested in trust with an estate for seventy-five years. He was not seized of the freehold; and having but an estate for years when he entered, he was not properly possessed of the land but of the term, the possession or seizin of the land still remaining in Sophia Cooper. Woodfall's Land. and Ten. 172; 2 Black. Com. 144; 1 Cruise, D, 64, 161. And this is not considered a seizin in law, but a constructive seizin in deed. 8 Cranch, 245. It is therefore said (Hargrave's notes to Co. Lit. 29, a) if land is in lease for years, courtesy may be without entry, or 172] even receipt of rents, *the possession of the lease for years being deemed the possession of the husband and wife. The case of De Grey et al. v. Richardson et al., 3 Atk. 436, was not unlike the present. During the coverture of Alice Sewell lands descended to her as heir in tail general, under a settlement, and when they descended were in the possession, and so remained during her life, of tenants under leases. It was decided by Lord Hardwicke that there was such a possession of Alice Sewell as entitled her husband to courtesy. The law appears to be with the plaintiff, and there must be judgment for him.

JAMES AND RICHARD LOINES v. JAMES PHILLIPS.

The security in a bond for the assignment and delivery of property, by a person applying for the benefit of the insolvent law, is liable for the creditor's whole debt, although the insolvent had not property to assign.

THIS case was adjourned here for decision from Ross county. It was an action of debt upon a bond, executed by the defendant as security for Stephen Loines, who, being arrested upon mesne pro-

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cess, applied for the benefit of the insolvent act, and gave the bond in question for the making a schedule and delivering up of all his property. The point presented for decision was agreed between the parties as follows:

"This cause is reserved for the special session at Columbus on an inquiry of damages. If the court should be of opinion that the insolvency of the defendants, or the amount and value of his property, can not be given in evidence, in mitigation of damages, then the plaintiffs are to have judgment for four hundred and thirty-seven dollars and eighty-two cents, and for costs, twelve dollars and sixty-six cents, with interest from November 15, 1821; otherwise the cause is to be sent to the Supreme Court of Ross county for inquiry of damages."

LEONARD, for plaintiff.

DOUGLAS, and BRUSH, and FITZGERALD, for defendant.

By the COURT:

The condition of the bond is, that the petitioner shall assign all his property for the benefit of his creditors. It is *the [173] general policy of our laws to hold the body of the debtor as a security for the payment of the judgment to be recovered. The debtor was compelled to submit to imprisonment, or find security that he would faithfully assign all his property for the benefit of his creditors. When the security is obtained the body is discharged, and the bond substituted for it. This court has nothing to do with the justice or policy of the law, which gives the creditor his power over the body of the debtor. It assumes the principle that such rigor is necessary to procure a surrender of property fraudulently concealed by the debtor. It is with another department of the government to say whether the punishment of individuals, upon presumption of fraud, would not be more justly inflicted, as in other offenses, by the public, after conviction, than by an interested and perhaps exasperated creditor before. Our business, however, is to expound and not make laws. The effect of this bond is the discharge of the prisoner, and he has had the full benefit of it. The petition and schedule exhibited furnish no legal presumption of the truth of either. There is not even the affidavit of the applicant that they are so. Between the filing and

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the final hearing of the petition the inventory can be enlarged or diminished at pleasure of the petitioner. If both are untrue no penalty attaches, nor does any power exist to punish him. He can, with perfect impunity, whether solvent or not, procure his discharge from arrest, and turn his creditor round to his remedy upon his bond. And he is directly interested in doing so if the amount of his property can only be recovered for the breach. The very fact of the applicant declining to avail himself of a final discharge, under the law, raises a strong presumption, not only that his principal object was abstractedly a release from imprisonment, but that he was, at the same time, not insolvent. Between the filing of the petition and final hearing, the applicant may have acquired property which would render him criminal to make affidavit of the truth of his schedule. The petitioner himself, and he only, is able to ascertain, with perfect certainty, the true state of his property. He may have property in other states or countries. This may consist of lands, stock, vessels at sea, choses, money, the extent or amount of which can not be known to others. Shall the voluntary [174] omission of the principal in the bond *compel the creditor to rely upon vague and uncertain evidence of the debtor's property, when it is for his interest to seal in secrecy his effects, and derive a direct advantage to himself by the abuse of the law in the first instance, and afterward by his own concealment and fraud? If the obligors in the bond are not liable beyond the amount of property of the principal, there would be a clear inducement to abuse the law and commit frauds. The court are undoubtedly authorized to put such a construction upon this bond and the damages to be assessed for a breach of its condition, as will prevent the debtor from taking advantage of his own wrong to the injury of the creditor, who is fairly pursuing the remedy the law gives him for the security and satisfaction of his debt. If damages are not recovered beyond the amount of the property of the insolvent upon the dismissal of the petition, the creditor would certainly lose the security of the person of the debtor, which the law, in the first instance, gave him, and this by the voluntary, if not fraudulent act of the insolvent. A part of his legal right would be lost without his own default and without consideration. Damages are defined to be a recompense to the plaintiff for the wrong done him by the defendant. Coke Lit. 572, a. The wrong here is procuring the body to be released under color of

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law, and then neglecting or refusing to assign all his property for the benefit of his creditors. The creditor has a right to seize the body and detain it, and after the judgment to take the land and goods for its satisfaction. He has lost one part of his remedy altogether, and can receive no equivalent, unless he can recover damages beyond the amount of property of the principal in the bond. It has been the uniform practice of this court, under the statute, if the defendant is imprisoned under a *capias ad respondendum* to take the debt; if under a *ca. sa.* the judgment, as the measure of damages to which the obligee is entitled. This rule was deemed essential to prevent an abuse of the statute as well as to guard the legal rights of the creditor. Members of the court who have succeeded to the bench have sometimes doubted its correctness; but the decisions have, nevertheless, been uniform by a concurrence of a majority of the court. There appears no good grounds for making, at this late period, an innovation upon the settled practice. Judgment for the plaintiff, according to the agreement of the parties.

*WILLIAM OLIVER AND MARTIN BAUM v. JOHN PRAY. [175

Where an appeal bond is defective, occasioned by the act of the clerk taking it, and the Supreme Court, for that reason, quash the appeal, upon showing probable ground that the appellant had a case at law, equity will interfere and grant a new trial. In such case, the case may be retained, and tried in the Supreme Court.

THIS cause was adjourned here for decision from the county of Wood. It was a suit in chancery, in which the original and amended bill set forth, that in August, 1827, Pray sued out process in Wood county against complainants, which was served on Oliver only. The declaration set forth a special contract made between complainants, by their *attorney in fact*, Peter G. Oliver, and Pray, whereby it was alleged that complainants sold to Pray, on June 30, 1819, tract No. 35, and eighty acres of No. 29 (particularly described in the declaration); that Pray paid at the time six hundred and thirty-one dollars and sixty-one cents, and the balance, one thousand eight hundred and ninety-four dollars and

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eighty-three cents, was to be paid in three equal annual payments, with interest. Deed was to be made on payment, etc. That Pray had paid in full, but complainants refused to convey, and had permitted the lands to be forfeited to the United States. The declaration also contains general counts for lands sold to which title had failed; also for money had and received. General issue pleaded by Oliver, and at May term, 1828, verdict and judgment against him for three thousand two hundred and twenty-six dollars and ninety-six cents. Due notice of appeal was given. Oliver not being present at the trial was informed of the judgment, and immediately went to Wood county to effect an appeal. The clerk at his request, prepared an appeal bond, which was drawn up by the clerk, or under his direction, and after having been executed by Oliver and his security, was accepted and approved by the clerk. That Oliver verily believed that said appeal bond was good and sufficient, and that said case was thereby duly appealed to the Supreme Court. That at the time Oliver applied to the clerk for an appeal bond the costs of the common pleas had not been taxed, and a blank, as usual, was left in the judgment for their insertion when taxed. That the clerk, by accident or mistake, omitted to insert the amount of costs in the appeal bond. That at the next term of the Supreme Court in Wood county the appeal was [176] quashed, upon motion of Pray, upon the sole ground that the costs were omitted in the appeal bond, and thereupon execution was immediately issued upon the judgment.

The bill further alleges that the verdict and judgment are altogether unjust; that complainants, nor either of them, are indebted, legally or equitably, one cent to Pray; that no such contract as set forth in the declaration was ever made or confirmed by complainants, nor was Peter G. Oliver ever authorized to make any such contract, nor did complainants ever receive one cent from Pray for, or on account of the lands. Also, that the verdict was procured by the fraud, management, and contrivance of Pray, his agents and abettors.

That complainants have a just and equitable defense in the suit at law, which is set out as follows:

In the summer of 1817, complainants and others formed an association to purchase lands at the public sales in Wooster, and in July of that year, among others, purchased the lands in controversy and made the first payment therefor. Oliver was consti-

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tuted the agent of the company, purchased the lands, laid off the lots, held the certificate as trustee, transacted all the business, and was the only one of the company who was intimately acquainted with the *locality*, *relative value*, and *situation* of the lands. In the summer of 1818, Oliver was made cashier of the Miami Exporting Company, in Cincinnati, and settled and closed all his accounts with the company, and transferred all certificates, etc., to Martin Baum, who was constituted trustee in his stead. In the summer of 1818, more than a year before the date of Perry's contract, Oliver sold out half his interest in the company to William Steele, and in the month of March, 1819 (also before the date of Pray's contract), Oliver sold out all his remaining interest to Jesse Embree & Co., since which time Oliver has had no interest directly or indirectly in the concern.

Early in 1818, Peter G. Oliver, brother of complainant Oliver, young and inexperienced, and having been somewhat unfortunate, applied to complainant Oliver to give him assistance. After some negotiations an arrangement was made, by which Peter G. took a tavern house of the company's, in the town of Maumee, and, for the rent thereof, was to collect rents for the company, protect the lands from waste, superintend *improvements, etc.; but had [177 no authority whatever, written or verbal, to sell the lands of the company, and never sold or pretended to sell any of the lands of the company except those now in controversy.

Complainant Oliver had lands of his own in the same vicinity, of which Peter G. also took charge; and, after complainant Oliver had sold out all his interest in the company, he, being well acquainted with the affairs of the company, and desirous to promote the welfare of his brother, Peter G., was often made the channel of communication between Peter G. and Baum, the trustee. That, in this way, and in his correspondence with his brother, Peter G., the wishes of Baum, the trustee, were often communicated by complainant Oliver to Peter G.

Early in 1819, Pray applied to Peter G. to purchase the lands in controversy. Peter G. told him he was not authorized to sell, but would write to the company. He did so, and received for answer that the company would not sell. Pray, having some object of speculation in view, revived his application to Peter G., and by crafty representation induced Peter G. to enter into a contract for the sale of the lands, knowing Peter G. had no authority,

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but relying on the friendship of complainant Oliver, for his brother, to relieve him from the difficulties in which Peter G. would become involved by entering into the contract. Accordingly, Peter G., without any authority whatever, either written or verbal, and without the knowledge of complainants or any of the company, executed a contract of sale to Pray under seal, dated June 30, 1819, as agent for Martin Baum—the larger tract at fourteen dollars per acre, and the smaller at two dollars per acre; one-fourth in hand, the residue in three annual payments: one-half in cash; the other half in beef, pork, etc., at market price. Deed to be made when patent was obtained. This contract was not made known to complainants or any of the company, but Peter G., on August 23, 1819, twenty-three days after the contract was made with Pray, wrote to the company the prices above mentioned, which had been offered, not stating other particulars, to which complainant Oliver, by direction of Baum, the trustee, replied September 16, 1816, that the lands could be had on the following terms: No. 35, at fourteen dollars per acre, *the whole of 29 at three dollars per acre. The purchaser to pay government, and the company to be paid in advance, annually, the first in erecting a kitchen, the balance in one and two years, with a lien on the property when the certificates are transferred. After this letter, nothing more was heard in relation to the lands by complainants, or either of them, or any of the company, and it was supposed to have been abandoned, and was forgotten.

In September, 1821, owing to the pressure of the times, the company was unable to clear all their lands out of the office, and, at that time, took the benefit of the act of Congress, for consolidating, in which they relinquished to the United States the two tracts in question, still ignorant of Pray's pretended claim.

Complainant Oliver had some lands of his own to consolidate, and while making his arrangements, Peter G. communicated his earnest desire that complainant Oliver should consolidate on No. 35, without stating any particular reason, but suggesting that it would benefit him, Peter G., in relation to some mill improvements. Shortly afterward, Peter G. informed complainant Oliver, that it was No. 36, instead of No. 35, which he wanted, and complainant Oliver, accordingly consolidated on 36, still ignorant of Pray's pretended claim on 35. It afterward appeared that 35 was the lot intended by Peter G., and that his object was to comply

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with the contract made with Pray, but the complainant Oliver knew nothing of his object or of the contract.

The first information complainants, or any of the company, had of Pray's contract or claim, was in the spring of 1822, long after the lands had been forfeited. Complainant Oliver then advised Peter G. to prepare himself and bid in the land at the resales, and offered to assist him if in his power; but this was done out of friendship only, and to relieve his brother from the unpleasant situation in which he was placed. Nor did Pray pretend that he had any claim on complainant Oliver, or any of the company; but, on the contrary, stated to complainant Oliver, that he had made arrangements with Peter G. to bid in the land at the resales.

About the date of Pray's contract with Peter G. for the land, Pray, by crafty representations, induced Peter G. to join him in erecting a mill, in whole, or in part, on 35, and so *man- [179 aged that a great part of the three first installments were converted into the mill, and no part of the purchase money ever was paid or come to the use of the complainants, or either of them, or any of the company.

Complainants charge that no part of the last installment has been paid. That Pray, on February 25, 1822, before the last installment was due, and after the lands were relinquished, persuaded Peter G. to accept of his promissory note or notes, for that installment, and indorse a receipt of payment in full on the contract, as of a date *prior* to the time it fell due, which was done by Peter. Suit was brought by Peter G., or his assignee, on some or all of these notes, and Pray set up, as a defense, that the consideration had failed, that Peter G. had no authority to sell, etc., and on these grounds, succeeded in his defense. Still the judgment includes the last installment, or a great part thereof. The indorsement on the contract was unknown to the complainants till after the trial of the cause at law.

In July, 1827, the lands were resold at Delaware. Pray and complainants were present—Peter G. was insolvent, and had removed to Huntsville, Alabama. At the resales, Pray did not pretend that complainants, or either of them, were under any obligation to purchase in the lands for his benefit, nor did he pretend that they, or either of them, were liable, in any way, to him, but, on the contrary, complained only of the hardship of his case, if any person should bid against him, and complainant, knowing

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that Peter G. had acted improperly, and being unwilling that any man should suffer on his account, endeavored to prevent competition against Pray. This was done at the request of Pray, and in consequence of his urgent entreaty, and not because he was under any legal, equitable, or moral obligation so to do. Pray purchased in the lands, at one dollar and twenty-seven cents per acre.

The bill prayed a new trial of the action at law. It also prayed a perpetual injunction, and final settlement of the case, in chancery.

Two of the facts charged in the bill were admitted in the answer: the existence of the association of Martin Baum and others, as a land company; and that, in April, 1819, Peter G. Oliver in-180] formed Pray he was not authorized to contract *for the sale of the company's lands. All the other allegations were denied, either directly or evasively.

The testimony taken in the cause presented strong probable grounds in support of the defense against the action at law, which the complainants set up in their bill. Several points were embraced in the argument, which the court deemed it unnecessary to decide. The report is confined to the subjects decided by the court.

WILCOX, for complainants:

The first question is, has a court of equity jurisdiction over the case made in the bill.

1. It is too late for the defendant to raise this question. "After answering and putting the merits in issue, the court will go on and decide as the equity of the case may require." 1 Ohio, 126; Gilb. Ch. 219.

2. Suppose the question to be open, and that the case stood on demurrer. The general rule, as contended for by the defendant, is admitted: that where a trial has been had at law, and a good defense might have been made at law, equity will not interfere, either for the purpose of granting a new trial, or for general relief.

A short examination into the origin and reason of this principle will show that it can not apply to this case.

In England, courts of law had not the power of granting new trials until comparatively a recent period, or if they had the power, refused to exercise it. The first reported case of a new trial, granted at law, is in 1655: "Indeed, for a good while after

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this time, the granting of new trials was holden to a degree of strictness so intolerable that it drove the parties into a court of equity." 1 Seld. Prac. 483, 484, and cases cited.

After the memorable contest between courts of law and equity in England, it is well known that almost all the important business of the kingdom was brought before the chancellor. The courts of law were compelled, in self-defense, to relax the rigor of their practice, and to adopt a system suited to the necessities of the times, and founded upon liberal principles. It was then, for the first time, that in ejectment the term might be recovered at law, without the interference of equity, and at the same time [181 the rule for granting new trials was established, which has ever since been adhered to in Great Britain and the United States, to-wit: "doing justice to the party," or, in other words, "attaining the justice of the case." *The Queen v. The Corporation of Helston*, 12 Ann. B. R. ; 1 Seld. 483, 484, and references.

After the adoption of this rule, the chancellor, satisfied that the power of granting new trials could be exercised at a much less expense of time and money, by the court of law who tried the cause, declined his jurisdiction, which, in the process of time, has ripened into the principle contended for by the defendant, and admitted by the complainants.

Now the court will remark that the accident, or mistake, of which we complain, took place after the term when the trial at law was had, and, of course, after the power of the court who tried the cause had terminated. If the accident had occurred during the term, and the party had neglected to apply to the court for a new trial, equity would probably refuse to interpose; but, in this case, a party presents himself, whose complaint the court who tried the case, had not the power to listen to, or relieve, and who is without remedy, unless it can be obtained in a court of equity.

We are, then, thrown back upon the ancient practice of the court of chancery in granting new trials. We stand before this court, sitting as a court of chancery, in precisely the same situation as we should have stood before the chancellor of Great Britain, when the courts of law, in that country, had not the power of granting new trials. It is evident that the court, who tried this cause at law, had not the power to grant us a new trial; and it is also manifest, that formerly, in England, courts of law had not the power to grant new trials. If, then, the principles of equity, which are

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universal in their operation, would have afforded relief in the one country, they must in the other.

No case, precisely in point with the present, can be found in England, or in any of the United States, except the State of Ohio, for the obvious reason that in no other system of jurisprudence are two jury trials permitted, one in an inferior court, and another in a superior court of record.

But the general principles of equity are sufficient for our purpose. Accident and mistake are two peculiar provinces of a court of equity, and it will be difficult to find any case where relief has been refused, if the accident or mistake be clearly proved. The doctrine upon this subject is collected and recognized in 8 Wheaton, 174, a case, if possible, stronger than the present. 1 Washington, 254, is also a strong case, and much in point. There, the court relieved against a mistake committed by the clerk, although the party had an opportunity, during the term, to apply to the court for relief, on motion.

This subject was presented to this court, in the case of Waddle & McCoy v. Bank of the United States, 2 Ohio, 336, where the principal authorities are cited. In that case the judges were equally divided. It seems that the two judges, who were opposed to granting relief, went upon the ground, that if Waddle and McCoy had used reasonable diligence, they would have discovered the prior lien, and could have taken advantage of it on the trial at law. The present case steers entirely clear of this objection. The cause of our complaint did not exist at the time of the trial, nor, indeed, until after the term had expired. No possible diligence could have corrected our mistake, and no tribunal has ever had the power to hear our complaint, except that before which we now appear.

The precise question raised in this case was decided by Judge Swan, in the case of Sells v. Noble & Sells, Franklin common pleas, and which will be fresh in his recollection.

The same decision was also made by Judges Burnet and Hitchcock, in Chadwick v. Miller, Lawrence county, the record of which is herewith furnished.

These decisions, fortified by every principle of equity and common honesty, can not, and ought not, to be overturned.

HAMMOND submitted an argument on the same side, which is omitted.

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EWING, for defendant:

The complainants seek: 1. A new trial 2. A perpetual injunction. On the part of the defendant, we insist that they are entitled to neither of these remedies.

1. Though the special prayer is for a new trial, there is another species of relief, similar in its nature, which may be claimed [183 under the general prayer, which, as it is essential to the full investigation of the case, I will briefly examine. Authorities are cited, which show that a bond, or other instrument, ineffectual for the purposes intended by the parties, will be corrected and set up in equity. So far as these cases bear, they point to another mode of relief, namely, *that the bond shall be set up in equity, and the appeal perfected*, thereby placing the parties where they would have stood, had there been no defect in the penalty of the bond. Though the complainants approach nearer to entitling themselves to this, than to any other form of relief, consequent on the bill; yet the authorities, in their bearing and analogy, do not support them in this.

In *Simpson v. Vaughan*, 2 Atk. 33, a joint bond was drawn by one of the obligors, under circumstances which induced the court to believe that it was intended to be joint and several, and equity made it so, in pursuance of the intent of the parties. There are numerous other cases of the same import, all resting on the same ground, the *intent* of the parties. The last and strongest of these is that of *Hunt v. Rousmanier*, 8 Wheat. 174-217, in which the court set up a power of attorney, as a specific lien, because it was the *intent* of the parties that it should be so, and it was, by mistake, made ineffectual.

The cases cited, arise out of transactions purely conventional, agreements *inter partes*; in which the *intent of the individuals contracting* is, in equity, of the essence of the contract. In these cases, therefore, it would be unconscientious in either party to take advantage of any mistake in the formation of the instrument which would make it speak a language, or favor an operation contrary to that intent. Equity will, therefore, interpose and restrain them from taking such advantage. But the case at bar is totally different. This bond is not the result of a contract between the obligors and obligee. It is from the first an adversary proceeding. The defendant was not privy to the making of it, nor was it even tendered for his acceptance. Two distinct tribunals were placed by the law between him and this instrument, which was filed by his

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adversary with the intent to bind him—the clerk, who must pronounce on the sufficiency of the sureties, and the court, who judge of the legality of the bond. If both decided in its favor, he was 184] compelled to accept it; if *either declared against it, he was freed from its effects. This bond, then, was never delivered or accepted. The defendant was not a party to it. It is not bad faith in him to refuse it, when the law has declared it insufficient. A court of equity, therefore, can not act upon his conscience, and compel him to accept it for what it is not, and for what he never agreed to receive it.

The relief asked (a new trial in the common pleas), on the ground of the defective appeal, is liable to more decisive objections than the mode of relief which is above discussed. *That* would place the parties in *statu quo*. *This* gives to the complainant important advantages, which he never could have had if his defense had been regularly conducted. *That* would require the defendant to accept of a defective bond. *This* would compel him to dispense entirely with the legal surety. Not only this, but the defendant having obtained his second trial, without *surety*, has afterward his right of appeal, and his third trial, as a matter of course, for the same cause. The injustice of this seems to me manifest. And, on the other hand, there does not appear that strong equity, in this part of the complainant's case, which would justify the court in overstepping the accustomed bounds of chancery jurisdiction, in order to afford them relief. Natural justice requires that a suitor should have one opportunity to prefer his claim, or make his defense; and if he lose it, wholly without his fault, equity will, if possible, interpose and restore him to his rights. But a right to two trials for the same matter is not so perfectly clear that we could claim it as a principle of justice, independently of positive law. If, then, positive law gives a second trial, on a condition which is not complied with (even though no one be chargeable with negligence), will a court of equity order a second trial, merely because the right to it once existed and is now lost? The case, so far as we can approach it in equity, is identical with those cases where no appeal is allowed, on any terms, by law. It is clearly so, if the court of common pleas be regarded as a serious tribunal for the trial of litigated rights, and not a mere sporting ground, where suitors play at foils, in order to prepare themselves for an actual contest in the superior court 185] *If this be a good ground for the interference of a court of

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equity, I would suggest another, which is equally so. A trial is had in the common pleas, and a judgment rendered against a defendant, which he takes to be unjust. He gives notice of appeal, and uses every effort in his power to procure bail, but fails. Is he not entitled to relief in equity? What single objection could be urged against him, which can not, with equal force, be directed against the complainants? Would it be sporting with the rights of the judgment creditor to give a new trial, solely on the ground of an inability to appeal? Is it not equally so, when the party has the ability, but fails to exert it? In either case, it would be doing nothing more than substituting a new trial, without bail, for an appeal with it, because the terms on which the latter could be obtained, were not complied with.

If the court sustain this bill, they open for improvement a new and fruitful field of chancery litigation. In appeals from justices of the peace to common pleas, frequent difficulties occur, for which the profession has, as yet, found no remedy. A defective recognition is taken; a slip of paper is sent by the bail to the justice, instead of a personal appearance, or, where the party goes forward, on the tenth day, to appeal his cause, the justice is absent, and he can not get him and his docket together. In all these cases (and their name is legion), courts of equity will be applied to for relief; and they must take jurisdiction on the principles of this case. Nay, on stronger ground, for here has been a trial by jury, the right to which is holden inviolate—in those cases there is none.

I have treated the case thus far, as if no laches were imputable to the complainant, in failing to perfect his appeal; but such is not the case. It is his duty to execute the bond, and see to its sufficiency. It is a question which he ought not to trust to the decision of the clerk. He should have submitted it to his counsel, and if he omitted this caution, he ought to bear the consequences of his own neglect. The clerk is agent for both parties, for the single purpose of settling the sufficiency of the bail. In taking the bond, so far as he acts, he is the agent of the appellant, who is bound by his acts, and to whom he is responsible, precisely as in any other act done by him in the progress of a cause. Plead it *on the ground of a clerical error, or omission; who ever [186 heard of a clerical error in the progress of a suit at law, laying the ground of relief in equity? I have found no case in which the acts or omissions of the party (applying), or of the officers of the court

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of law, done by the request of the party applying, have been corrected or relieved against by a court of equity.

An appeal is allowed from the common pleas to the Supreme Court, in chancery. One of the parties in the cause, dissatisfied with the decree, attempts to take an appeal, as in this case, and fails. Would the court sustain a bill to open the cause, on this ground, and have it reheard? It might be necessary for the purposes of justice that they should. The parties may have been negligent in taking testimony, and did not prepare themselves for trial in the court below, and have no ground of relief on their new bill, except the failure to appeal. It would be a hard and rather singular case; but if this bill be sustained, that must also. In every state in the Union, appeals from one tribunal to another are matters of daily occurrence. Appeals are quashed from defects in the bond; but in no case has a court of equity interfered, in any way, to relieve against it. This fact carries with it a strong argument against the jurisdiction. But when we consider the extent to which the principle, if once adopted, must go, and the harsh and unequal nature of the only relief which the court can grant, it seems to me conclusive.

This being a new experiment, we can find no case in point against it; but there are some authorities closely analogous.

In *Dodge v. Strong*, 2 Johns. Ch. 228, the complainant sets forth a strong case of injustice, in a judgment obtained against him by default, in his absence, under circumstances of considerable hardship. An application was made to the court at law for a new trial, who granted a rule on condition that the complainant should pay into court, in four days, the amount of the verdict and costs. He paid in the amount of the verdict, but not the costs, the cost bill not being taxed; and, in consequence of this omission, lost his new trial at law, and thereupon filed his bill in chancery, for relief, which was denied him. Chancellor Kent says, "the object of 187] the bill was *to obtain a new trial at law. The defense of the plaintiffs, if any they have, was legal and available at law, and if this court could grant relief, it would be by requiring the present defendant to submit to a new trial. But it appears to me, after a very careful examination of the case, as disclosed by the bill and answer, that I can not retain the injunction, consistently with established doctrines of this court. The plaintiffs, by their own negligence, or that of their attorney, suffered an inquest to be taken against

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them by default. They then applied to the Supreme Court for relief, which was granted on certain conditions, and those conditions were not fulfilled. Here was a second default, and this court can not now interfere." And again, in reference to the same facts, he adds, "it is impossible to expect the aid of this court, unless the failure to comply with the condition arose from the act of the opposite party, or some unavoidable necessity." In the case of *Simpson v. Bateman*, 1 Schoale & Lefroy, 201, we have the opinion of Lord Redesdale, on a case similar to the one at bar. A verdict was had, at law, against the complainant, which he considered unjust, and having failed in his application for a new trial, on account of a defective notice of the motion, he sought relief in equity. But the bill was dismissed, and Lord Redesdale said that he could not find any ground whatever, for a court of equity to interfere, because a party had not brought evidence, which was in his power, at law, or because he had neglected to apply, in time for a new trial. "There are cases," he adds, "cognizable in law and also in equity, and of which cognizance can not be effectually taken at law, and therefore equity does, sometimes, interfere. So, when a verdict has been obtained by fraud, or where a party has possessed himself, improperly, of something, by means of which he has an unconscientious advantage, at law, which equity will either put out of the way, or restrain him from using. But, without circumstances of that kind, I do not know that equity ever does interfere to grant a new trial of matters which have been already discussed in a court of law. A matter capable of being discussed there, and over which a court of law has full jurisdiction."

It seems to me, on the whole, that the complainant is no better entitled to the relief prayed than he would have *been, had [188 the law allowed no appeal from the common pleas to the Supreme Court. He had his trial in the court below precisely as he would have had; the verdict and judgment have been the same, just or unjust, that they would have been; and the party has been guilty of some laches, in not availing himself of the remedy the law afforded him. If, then, the complainants make out a case for a new trial, independently of all right of appeal, let them have it. If not, equity can not give it them.

POWELL also submitted an elaborate argument on the same side, which is omitted.

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WILCOX, in reply :

It is alleged that the appellant must draw up the bond at his own hazard, that the appellee is no party, and that the clerk's duty consists, simply, in "approving the securities."

The clerk, as well by the statute as by universal practice, is bound to draw up the bond. The statute gives him a compensation for it; he acts as agent for both parties; the bond is made payable to the appellee; it is delivered to the clerk, and not to the appellee; the approval of the clerk is the approval of the appellee. Suppose that under the statute it was necessary actually to deliver the bond to the appellee instead of the clerk, and the appellee had approved and accepted the bond as a valid one, and it afterward turned out to be defective—the very cases cited by the defendant show that this court would relieve without hesitation. Where, then, is the difference between the cases. A delivery to the agent is a delivery to the principal. It is to all intents and purposes a contract, in the language of the counsel, "*inter partes*." But it is not necessary for the complainant to go so far. It is sufficient for us, that a ministerial officer of the law, in the performance of his duty, has committed a mistake greatly to our prejudice, and that the opposite party is seeking to obtain an unconscionable advantage founded upon this mistake.

The counsel seems to entertain great doubts as to the mode in which this court will exercise its jurisdiction in awarding a new [189] trial. That, if a new trial is awarded in *the common pleas, there may be three more jury trials, and, in the meantime, the defendant will lose his security. This court will exercise a sound discretion upon the whole case. A trial may be directed in the Supreme Court, and this court may order the present judgment to stand as security, or the court may direct a trial in the common pleas, or the court may retain this case and award an issue out of chancery to try any facts that may be considered doubtful. The court may make such order as will secure the rights of all parties.

That one trial has been had, it seems to me, is of no consequence, so that this court are satisfied that justice was not done between the parties on that trial. The right of a trial by jury in the Supreme Court is a positive right, and, in nine important cases out of ten, a judgment passes by consent in the common pleas. Neither law, nor common practice, nor common honesty require

that a party should use that diligence in preparing his case in the common pleas, as upon final trial in the Supreme Court. The case now before the court is a common instance. Parties reside at a distance, pay little attention to a trial in the common pleas, resting their hopes upon an impartial trial in the Supreme Court.

The counsel supposes a case where a party can not procure bail, and asks, what would the court do in such a case? When such a case arises, the question may perhaps be answered. But if the adverse party should, by a fraudulent combination, prevent an appeal, the question would be somewhat varied.

It is also said that if this bill be sustained, a class of cases from justices of the peace, where defective recognizances have been made, and whose "name is legion," will be forced upon this court. It is only necessary to remark that the statute points out the mode by which such defective recognizances may be remedied in the common pleas.

I will not take up the time of the court in examining the numerous cases cited by the defendants. There is this sound palpable distinction between the cases cited and the one before the court—here a mistake has occurred after the power of the court, who tried the cause, had terminated, *and the party has had no oppor- [190
tunity of correcting the mistake.

It is true that to rectify this mistake, and to do justice between the parties, require the exertion of the extraordinary powers of this court. But, if the court will be at the trouble to trace the history of this court from the time it first asserted jurisdiction over judgments at law, they will find these powers recognized, and occasionally, though not frequently, exercised. Extraordinary cases will sometimes arise in all civilized governments, and there is, of necessity, an extraordinary power vested somewhere to meet such cases. The court will find all the cases of this nature collected in a note, 3 S. C. Equity, 325, the result of which is, "that courts of equity will give relief in all cases (not of a criminal nature) of fraud, surprise, or extraordinary cases, where complete justice has not been done, and in many cases on principles of general policy."

Opinion of the court, by Judge SWAN:

The principal question is, whether a court of chancery has jurisdiction of the case, as made by the bill. The question, in this

respect, is important, and has received the full consideration of the court.

The statute of February 18, 1824, vol. xxiv. 72, allows an appeal to the Supreme Court, of course, from any judgment or decree rendered in the common pleas, in which such court had original jurisdiction; and the party desirous of appealing shall, at the term of the court of common pleas at which the judgment or decree was rendered, enter on the records of the court notice of such his intention, and within thirty days after the rising of the court shall enter into bond to the adverse party, with one or more good and sufficient securities, to be approved of by the clerk, in double the amount of the judgment or decree rendered, etc. The appeal bond, in this case, was taken in double the amount of the judgment, exclusive of costs.

On motion of the respondent, the Supreme Court quashed the appeal upon the grounds that the bond was not executed in conformity with the provisions of the statute. The amount of the [191] penalty was supposed to be matter of positive law, and one of the requisites upon which the appellate jurisdiction of the court depends. To effect an appeal, the provisions of the statute, no doubt, must be substantially complied with. It can not be done without the notice is entered of record, at the term in which the judgment or decree was rendered. So the appeal must fail, if the bond should not be executed within the time proscribed by the act, and it has been several times decided that the penalty of the bond must be in double the amount of the judgment or decree, including the costs.

The party has his right of appeal, upon complying with the conditions annexed by the statute. His right is lost, by omitting or neglecting to perform any of the conditions, and the appellate jurisdiction of this court altogether ceases over the cause. With regard to notice and filing the bond, within thirty days after the rising of the court, the decisions have been uniform, that the omission, in either case, ousts this court of its jurisdiction. It is undoubtedly within the powers of the legislature to attach all reasonable conditions to the right of appeal, and thus place a limitation upon the appellate jurisdiction of this court. The cause is not appealed without the party performs the conditions required by statute, and when he neglects to do so, to entertain jurisdiction would be mere usurpation of power. But the objection comes too

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late, to the correctness of the decision, in dismissing the appeal. The party complaining of the injury is fixed with the judgment of the court of common pleas, and the common law can afford him no remedy. This is the case, whether the dismissal of the appeal was justified by a correct interpretation of the law or not. The injury, if any, to the complainants has originated with the clerk, who prepared the bond, or with the appellant who executed it. Uniform practice has fixed the drafting of these bonds upon the clerks. Their offices are usually furnished with blanks for the purpose.

The bill and evidence show conclusively, that the bond was, in good faith, prepared by the clerk, and in good faith executed by the principal obligor. By mere mistake, or misapprehension in both, the costs were not doubled with the judgment, and inserted as the penalty. Doubts as to the necessity of adding the costs, in the penalty of the bond, *have existed with the bar. Even [192 some of the judges have not been without them. This is a mistake, then, which a plain man, acting in perfect good faith, might naturally commit, upon the most careful examination of the law, and using every effort to comply with its provisions. No fault or negligence can be imputed to the party seeking to resist the plaintiff's claim in the appellate court. The record shows most satisfactorily, that Oliver honestly believed he had a meritorious defense to the action. In no part of the proceedings does it appear that he was using the court of common pleas merely to ascertain the strength of his adversary. The cause was submitted to the jury in his absence, and there are circumstances disclosed, by the evidence and exhibits, which show an effort, on the part of the present defendant, to prevent the appellant from obtaining security to the acceptance of the clerk, not very consistent with the idea that the judgment was fairly recovered and justly due. But although this may cast a shade of suspicion over the fairness of the judgment, it does not lay the foundation of chancery jurisdiction. From the nature of society, it is difficult, if not impossible, to embrace the powers of a court of chancery in a general definition. Peculiar and extraordinary cases will arise, in the complex and diversified affairs of men, which perhaps can not be classed under any of the distinct heads of chancery jurisdiction, but which must be acknowledged, nevertheless, to come within the legitimate powers of the chancellor, because complete justice can not

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otherwise be done between the parties. Of this character is the case of *Ray v. Duke of Beaufort*, 3 Atk. 191. In that case Lord Hardwicke makes some remarks quite applicable to the case under consideration: "It frequently happens there may be a just cause of action, yet the real motives may be very unjust, which a court of equity will always take into consideration, though they can not, at law, pay any regard to it."

The following cases show that courts of equity go far to prevent injustice, when no remedy exists at law. *Countess of Gainsborough v. Gifford*, 2. P. Wms. 425; *Hunt v. Rousmanier's Adm'r*, 8 Wheat. 174. Further authorities are collected in a note to 3 Desaus. 325. This reference wants accuracy; but some of the 193] cases go far to justify the remark, *"that courts of equity will give relief in all cases, not of a criminal nature, of fraud, surprise, or extraordinary cases, when complete justice has not been done; and in many cases upon principles of general policy."

Anciently, courts of equity exercised jurisdiction in granting new trials in cases of manifest injustice, or when testimony had been newly discovered. The practice went out of use when courts of law became more liberal in granting new trials. 6 Johns. 479. Chancellor Kent says, "the present case seems to prove an exception to the modern rule, and to require of this court the exercise of that ancient jurisdiction, because here is a case in which the court of law has no power to award a new trial upon the merits." The case at bar is within the principle and reason of the one last cited. This defective statutory bond was executed after the term, when it was neither in the power of the party to apply for, nor of the court to grant a new trial. It is a case within the exception of the modern rule, and the court is therefore permitted, upon the justest principles, to resort to "its ancient jurisdiction." This court considers this as an extraordinary case, in which the injured party has no redress, if a court of equity has no jurisdiction. Great injustice may follow, especially to the complainant Oliver, should the judgment of the court of common pleas conclude the parties. From the peculiar circumstances of this case, and to prevent that injustice which may otherwise take place, this court believes no sound principle is violated by entertaining jurisdiction of this cause. But it is not enough that the court has jurisdiction of the subject matter. We must be satisfied that the complainants have some merits, some grounds of defense to the action at

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law, before the judgment will be set aside. It is not enough that the party has lost the naked right of a second jury trial in the Supreme Court. A judgment never ought to be opened to gratify a spirit of litigation.

From the novelty of the circumstances of the case, and from the fishing grounds assumed in the bill, in order to catch an equity as well as the amount in controversy, a vast many exhibits, and a great body of testimony, are found with the record. The evidence in the cause shows most satisfactorily *that the complain- [194] ants have grounds of defense to the action at law.

It is not proper for this court to say what effect that evidence ought to have, or may have, upon an issue between the parties. Nor does it anywhere appear, nor was it necessary it should appear, that all the evidence is produced in this cause within the power of the parties. It is competent for the parties to produce other testimony in explanation of their rights and the merits of the cause. The complainants can not ask more of this court than to be restored to what they have lost, without their default. If the defendant had a just claim upon the complainants to the amount of his verdict and judgment, he has it still, and can prosecute it in the Supreme Court as well now as he could if the appeal bond had, in form, met the approbation of the court; if he had not, to enforce the judgment would be against all equity. As to accepting the bond, the mistake originated with the agent of the law as well as the appellant. The clerk was wholly ignorant of the law, or of the construction which had been put upon it, as to the penalty of the bond. We are not, however, prepared to say that a mere mistake in law of a party would give this court jurisdiction, although there are some cases which seem to go that far. 3 Wheat. 174; 2 P. Wms. 315. It seems to this court this would be laying down the principle too broadly. There must, in general, be other circumstances to authorize the interference of a court of equity. Perhaps it would be well to make the case, in addition to a mistake in point of law, one in which it would be against conscience for the other party to insist upon, or which, at once, would shock the moral sense, if enforced. This is that case, as the bill and evidence disclose it. The respondent has obtained an advantage by the misprision of the clerk, or the mistake of one of the complainants, which he is attempting to retain, when he must know that the appellant has acted, so far as it respects the

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pursuit of his legal rights, with perfect good faith, and with all reasonable diligence. He must also know that the complainants, especially one of them, have some legal grounds of resisting his claims in a court of law. The law would be dishonored if courts were furnished with no powers to place the parties thus situated 195] in *statu quo*, and thus prevent probable injustice. There *is no principle to be found in the books which forbids a court of chancery from granting relief under such circumstances. Reason, justice, equity, require it.

This cause, upon the settled rule that when the court of chancery has gained jurisdiction of a cause for one purpose it may retain it generally, will remain in this court. This being the unanimous opinion of the court, it is therefore ordered, adjudged, and decreed that the action at law, the judgment in which is enjoined in this cause, be docketed in the Supreme Court in the county aforesaid; that the declaration be so amended as to make said Martin Baum a party thereto; that the said Martin cause his appearance to be entered in the said action, plead thereto the general issue, and that the cause stand at issue for trial, on the merits, at the next Supreme Court for said county. On the trial, no objection shall be taken for misjoinder or want of parties, further than this: If it should appear that the plaintiff has a good cause of action against Oliver, arising out of the transaction in litigation, but not against Baum or any other of the company in the pleadings named in these causes, then a verdict shall be taken against said Oliver, and not against said Baum; if it should appear on the trial that the plaintiff has cause of action, growing out of the transaction in litigation, against the said Baum alone or the said Baum and others, then the verdict shall be taken against the said Baum, and in favor of the said Oliver. In this trial no exceptions shall be taken to the depositions in this suit in chancery or the action enjoined, but they may be then read, unless there may be other legal objections taken and sustained.

This cause to stand continued for further proceedings, etc.

MCCLUNG AND TREVOR v. JAMES MEANS.*[196]**

A letter to B., from M., giving general credit to P., does not charge M. for goods sold to P. by persons who never saw the letter, but had heard of its contents.

THIS cause came before the court upon a motion for a new trial, made in behalf of the plaintiffs, and was adjourned here for decision from Jefferson county. The case was this: The plaintiffs brought their action of assumpsit, and declared for goods sold and delivered as upon an original contract with the defendant. In support of their claim they gave in evidence the following letter, addressed by the defendant to Mr. James Boggs, of the house of Knox & Boggs, Philadelphia:

“STEUBENVILLE, *December 26, 1825.*

“MR. JAMES BOGGS—*Sir:* All the goods C. O. Page may purchase in Philadelphia during the month of January, 1826, I hold myself accountable for the payment of the same.

“Respectfully yours, JAMES MEANS.”

This letter was not delivered or intrusted to C. O. Page, but was forwarded to Mr. Boggs, and in the month of January, 1826, was shown by him to several merchants in Philadelphia, but was never shown by him to the plaintiffs. C. O. Page was the brother-in-law of Means, the defendant, and was known to be insolvent. The plaintiffs were informed by David King, who learned the fact from a brother of C. O. Page, that the defendant had written a letter of general credit to Boggs. They sold to Page merchandise to the amount of thirteen hundred and forty-five dollars and fifty-four cents in the month of January, 1826, and on the 20th of that month took his individual note for that sum, at ten months, with interest after four months. Page purchased goods of Knox & Boggs and others upon the credit of the letter, for which the defendant paid. The clerk of the plaintiffs testified that the goods were sold to Page, on the credit of the defendant's letter to Boggs, of which the plaintiffs had received information as stated. There was no proof in the case that the plaintiffs had ever given any direct notice to the defendant of a claim against

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him for goods sold to Page. But there was proof that, in August, 1827, defendant conversed about the claim, and refused to pay it, 197] not on the *ground of want of notice, but on the ground that his letter not having been shown to them, they could not charge him with the goods. The court at the trial instructed the jury that the plaintiffs could not recover unless, within a reasonable time after the sale, they had notified the defendant of the sale made to Page upon his account. Under this instruction, a verdict was returned for the defendant, and the plaintiffs moved for a new trial on the grounds of misdirection by the court.

D. COLLIER, in support of the motion, insisted that the understanding being original in its character, notice was not necessary. He cited 2 Term, 80; 1 Salk. 27; 6 Mod. 248; Cowp. 229; Ld. Baym. 224; 17 Johns. 114; Fell on Guar. 20-40.

J. C. WRIGHT, on the same side.

TAPPAN, for defendant.

By the COURT:

One of the questions made on the trial was, whether the plaintiffs could recover without reasonable notice to the defendant. The view the court has taken of the case renders it unnecessary to decide that question.

The principal question arises under the mercantile law, which has its foundations in good faith. The first thing to be considered is the object of the letter, so far as it is explained by the contents, and other facts and circumstances proved in the case. The letter appears to furnish a credit, limited only by time. The liability to be incurred was an indefinite amount, without any specification of the time or mode of payment. These were left to the discretion of Page, or of Boggs, or of both of them. They could not have been submitted to the dealer with Page. This would have been a folly too great to impute to the writer of a letter of credit in his sober senses. If the discretion was confided to Page, no good reason can be given why the letter was not delivered to him. But as it was not, the fact itself furnishes a very strong argument 198] that the writer did not intend to place such *unlimited confidence in him. The letter was addressed, not to the firm, but to

one partner; and this, independent of the other circumstances, shows there was a trust and confidence of some kind reposed in Boggs, the individual to whom it was written. According to the reasoning of the plaintiffs, there was no other object in this than to give the contents publicity in the city. The answer is that Page could as well do this as Boggs. The motive of the writer was in some way to benefit Page through the instrumentality of Boggs. It might be, and it seems fair to presume it was, to introduce Page to men of integrity and fair dealing, and prevent his being overreached by every sharper that might by chance meet with him. The circumstances warrant the conclusion that Boggs had something to do with the extent of the credit, as well as the persons to whom Page should be introduced.

All these matters of discretion in Boggs seem justly inferable from the nature and circumstances of the case. It appears one of the partners (plaintiff) had indirectly got information of the contents of the letter; besides, rumor had probably spread them over the city, and had brought them to both partners. There would, however, be something assuming the appearance of a departure from strict fairness and propriety to permit a man, perhaps a young and inexperienced one too, to be sought out and made enter into extensive engagements, to charge a friend, without an introduction or exhibition of the letter upon which the writer was to be charged, to an unlimited amount. Such is not the ordinary course of fair-dealing merchants. In the absence of authority, the court would pause before they would give countenance to a transaction attended with such circumstances of unfairness. The case of *Ayliff v. Mr. Justice Tracy*, 2 P. Wms. 65, bears a strong analogy, in principle, to the one before the court. The plaintiff courted one of the daughters of Sir T. Hazlewood, and treated with the father about the marriage, who consented to it. He wrote his daughter, intimating that he had met the plaintiff, and had agreed to give him a portion, and subscribed his name to the letter. The father died before the marriage. *The daughter did not show the letter to the intended husband before the marriage.* The father had made his will before the *treaty [199 of marriage, and left his daughter a legacy of two thousand pounds, which the husband received. It was held this was no more than a communication, and not being shown to the husband before his marriage, he could not be supposed to have married in

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consequence of it, etc. 4 Wheat. 89, note. The very fact that the plaintiffs did not call upon Boggs to see the letter or obtain a copy, although one of the partners had understood such a letter had been written, shows that they either intended to give credit to Page or that some apprehensions were entertained that Boggs would decline recommending their house to him. It would be fairer to presume the credit was given to Page himself than to Means, upon vague rumor. Indeed, the probability it was given to Page is a good deal fortified by the facts that his note was taken for the amount, and that no notice was given or demand made for payment of Means until some time afterward. If the credit was given to Means, why take the note of Page? The answer is a difficult one to make, consistent with the plaintiffs' present claims. It is not unfair to impute to the plaintiffs extreme negligence, if they originally intended to charge Means, or an intention to withdraw Page from the vigilance or experience, or both, of Boggs, who most certainly was intrusted with some agency and discretion by Means. The whole circumstance of the case warrants the latter conclusion. This stamps the transaction with a want of fairness, and forbids the court to aid the plaintiffs in reaping the fruits of their own imposition.

The circumstances of this case authorized the jury to find for the defendant, and judgment must be entered on the verdict.

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Justices of the peace have no jurisdiction of actions upon the case for nuisance. Defendant appeals from a judgment of a justice of the peace in action of nuisance. The cause is docketed in the common pleas. Declaration filed and pleas put in. Defendant may then move to quash proceedings for the original defect of jurisdiction. Upon quashing such appeal, no judgment can be given for costs.

THIS cause was adjourned from the county of Belmont, where it came before the court upon a writ of *certiorari* to the court of common pleas, in the following case:

The plaintiff brought an action on the case against the defendant for a nuisance, in causing the water to flow back on plaintiff's

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land by a mill-dam. The suit was brought before a justice of the peace, and judgment rendered against the defendant, who took the case, by appeal, before the court of common pleas. A declaration was filed, pleas put in, an issue joined, and an order of survey made. After all these proceedings, the defendant, the appellant, moved to quash the appeal, on the ground that the law gave a justice of the peace no jurisdiction in an action on the case for a nuisance. The court of common pleas made an order quashing the appeal, and gave judgment against the plaintiff for costs. To reverse this order and judgment the writ of *certiorari* was brought.

TAPPAN, for plaintiff in *certiorari*.

J. C. WRIGHT, for defendant.

By the COURT:

Three questions are presented for the consideration of the court:

1. Had the justice jurisdiction of this action?
2. Have the parties waived jurisdiction by pleading, suffering, continuances, etc.?
3. If the court of common pleas had no jurisdiction, could a judgment be rendered for costs on dismissal?

1. The cases excepted from the jurisdiction of justices of the peace are "actions against justices of the peace for misfeasance in office, actions of ejectment brought to obtain possession of lands and tenements, actions of replevin, actions of slander, actions on contracts for real estate, or when the title of land is called in question, except trespass on real *estate," etc. In this [201] action, a mere naked possession, a title of the lowest and most imperfect degree, but nevertheless a title, is necessary to enable the plaintiff to support it. It is settled that, in personal actions against a wrong-doer, it is sufficient to state in the declaration that the plaintiff was possessed without setting forth specially the title. Cro. Car. 499; Com. Dig., Pleader, C, 39; 3 Term, 766. It can hardly, however, be denied, that possession is one species of title, and that this must either be established on the trial, or the plaintiff will be nonsuited. The title, so far as possession constitutes it, is the first question to be determined at the trial, and if the plaintiff fails in this, he must fail in the cause. It may be ascertained *prima facie*, and this may be rebutted by testimony on

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the other side. 3 Starkie's Ev. 987. The word *title* in the statute must be taken in its technical, legal sense, and if so, a naked possession must be admitted to be comprehended in the term.

It has been suggested, in favor of the justice's jurisdiction over this and other similar actions, that although it is necessary to set out the title of the plaintiff in the declaration, yet until the pleadings disclose a question concerning it, the jurisdiction of those inferior courts is not ousted by the statute. If this was the true criterion, it would be within the power of the defendant, at any time, to preserve or destroy the jurisdiction of the court. This would leave no rule by which the jurisdiction could be ascertained. Certainly a matter so important as the jurisdiction of a court ought to have, if possible, some rule of general application. Hence in the case of *Hulsicamp v. Teel*, 2 Dall. 358, the court held the damages laid in the declaration, and not the amount assessed by the jury, as evidencing jurisdiction. Indeed, the mere discretion of the party, or the finding of a jury, upon a question of damages, ought not and can not affect the jurisdiction of the court. The same principle has been decided by the English courts. 3 Burr. 1592; 2 Will. 48.

But if doubts could be entertained whether this case is excluded from the jurisdiction of justices of the peace, section 67 of the judiciary act would seem completely to remove them. The statute declares "that in all actions for libel, slander, malicious prosecution, assault and battery, *action on the case for a nuisance*, 202] etc., if the jury, upon the trial *of the issue, or on inquiry of damages, shall find or assess the damages under five dollars, the plaintiff shall not recover any costs." It is true this act is prior in date to that regulating the duties of justices of the peace, but both were passed the same session. The same class of cases has long been excluded from the jurisdiction of justices of the peace, and while they were excluded, a separate law was passed, the same in substance as the provisions in section 67 of the judiciary act. Upon a fair comparison of these acts, and a correct construction of their provisions, no doubt can be entertained that the legislature considered the action on the case for nuisance not within the jurisdiction of justices of the peace. Upon a different construction of these statutes on an appeal by either of the parties, the plaintiff could not recover costs, unless the jury assessed the damages to five dollars or upward. It would be difficult to dis-

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cover a plausible reason for making the action on the case for nuisance an exception to all others in this respect. This would be the only exception to the general law, that where the matter in controversy is within the jurisdiction of a justice, the costs, whatever the amount assessed, should follow the damages. If the actions of ejectment, slander, etc., ought not to be tried by a justice of the peace, by reason of their greater importance to the community and to the parties, or the greater difficulty of comprehending and applying the rules which govern them, it seems quite proper that actions on the case for nuisance, which frequently present very complex questions of vast importance to estates, depending, for their decision, upon nice discrimination and accurate knowledge of law, should also, in the first instance, be brought before the courts of record, where the judges are selected from the profession, and are supposed to have a more perfect knowledge of the legal rights of the parties. But it seems unnecessary to resort to the reason for the particular exclusion, where the legislature has put a construction upon the justices' act which shows a manifest intention to exclude the action under consideration from their jurisdiction.

2. The question presenting more difficulty is, whether the defendant, by suffering continuances, pleadings in bar, etc., has not precluded himself from making objections to the jurisdiction of the court. It appears to be a general *rule that objections to [203 the jurisdiction come too late after a plea in bar, and that the want of it must be taken advantage of by plea. 2 Ven. 484; Co. Lit. 127; 6 Cow. 161; 3 Johns. 105. To this general rule there are exceptions. Where the court has no jurisdiction at common law, or it has been taken away by an act of the legislature, such want of jurisdiction may be pleaded in bar, or be given in evidence, under the general issue, and is not properly the subject of a plea in abatement. 1 Chitty, 428; 1 East, 352; 6 East, 583. In the case of Parker v. Elding, 1 East, 352, the plaintiff brought his action for depasturing cattle, etc., and proved himself entitled to recover a sum under forty shillings

The defense set up was, that the debt was contracted in the Isle of Ely, and the statute of 18 Geo. III., c. 36, which declares, "that no action or suit for any debt not amounting to forty shillings, and recoverable, by virtue of this act, in the said court of request, shall be brought against any person residing or inhabiting, within

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the jurisdiction thereof, in any of the king's courts of Westminster, ect., or elsewhere, out of the said court of requests." The court held they were bound to take notice of this law. How, then, say the court, can we say that the plaintiff shall recover against the positive direction of the act? The decision was against the exercise of jurisdiction. The case under consideration, upon the face of the papers, was in the common pleas, and must have been tried by that court, by virtue of its appellate, and not of its original jurisdiction. It is the essential criterion of appellate jurisdiction, that it revives and corrects the proceedings in the cause already instituted, and does not create that cause. 1 Cran. 175. The courts of justices of the peace, if not all others in this state, are of limited jurisdiction. If not inferior, in the technical sense, so that transcripts of their proceedings must show jurisdiction, they are limited, and when it appears that the powers given by law have been transcended, the appellate court is authorized to treat the proceedings as a perfect nullity. The appellate jurisdiction of the common pleas is based upon the jurisdiction of the justice whose transcript is brought up. If it appears from that, the justice had no jurisdiction, the superior court is left to create the cause, or dismiss it. A safe and convenient general rule for [204] this court to adopt, would perhaps be, that, *when upon the face of the papers it appears that the appellate, and not the original powers of the common pleas are sought by the parties, and that the subject matter was not within the jurisdiction of the justice, to dismiss the proceedings, upon motion, in any state of the cause; but when the papers do not sufficiently disclose these facts, and the defendant pleads in bar, to consider the process as waived, or the jurisdiction admitted. This will preserve the distinction between the original and appellate jurisdiction of the court, and prevent the confusion and difficulties which might arise, either from the illegal exercise of powers by justices of the peace, or by having the independent judgment of two courts for the same cause of action. The latter would have been the case in this instance, if the common pleas had considered the proceedings of the justice a nullity, for want of jurisdiction, and had treated the cause as originating in the higher court. We are of opinion that an appellate court, as such, has no jurisdiction of the subject matter where the court in which the cause originated had none. Therefore, when the parties themselves show the fact, it is the

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duty of the appellate court, in any stage of the proceedings, to dismiss the cause, and leave the costs to be recovered by those interested in them.

The judgment of the court below is affirmed, as to the dismissal of the cause, and reversed as to the judgment for costs. See *Kennedy v. Terrell*, Hard. 490.

***THOMAS BUTLER v. LEONARD H. COWLES, ADMINISTRATOR [205
OF MOSES BIXBE.**

Action of *assumpsit* for use and occupation, will not lie, to recover means profits, after recovery in ejectment.

THIS cause was reserved in the county of Delaware, on a written statement, as follows: "In case, etc., for use and occupation. It is agreed in this case, that Moses Bixbe, in his lifetime, took possession of the premises in the declaration mentioned, claiming title to the same. That he used and occupied them a short time himself, and afterward by his tenants, who paid him the rent in money, etc. The plaintiff, also, during the occupancy by Bixbe, claimed title to the same premises, and from time to time, gave notice to Bixbe that the premises were his. It is admitted that the legal title to the said premises was in the plaintiff, and still is in him, and that he took possession under a *habere facias*, having recovered in an action of ejectment. If the plaintiff is entitled to recover under this statement of fact, then a jury shall assess the damages; if not, there shall be a judgment of nonsuit, etc."

PARISH & BOATT, for plaintiff:

From the nature of the ancient English tenures, as they existed until the abolition of their most prominent features, in the reign of Charles II., it can not be expected that anything should be found in the old authorities and books, shedding much light upon this subject; and it will be found that, since that time, courts have been extending the remedy so as to operate beneficially for plaintiffs, according to the justice of their case; especially since the 11 George II. and the liberal construction given by Lord Mansfield to the action of *assumpsit*.

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It has been said that the action for use and occupation was given by the 11 George II., and that, before that time, the action did not lie, unless there was an express agreement; but from a view of the authorities, it will be seen there was a distinction between lands and houses or shops. Com. Dig., title Action on Assumpsit, C. In the latter instance, it was not necessary that there 206] should have been an express promise, *but in the former, it was. *Vide Comyn, ut supra.* In some cases, it was held that assumpsit would lie on implied contract, for the use of lands, 2 Mod. 260; in others, it was held that the law would raise no promise during, or after the term, for it is an incorporated hereditament, savors of realty, and arises by privity of estate. Roll. Abr. 7 v. 25, 30; Cro. Car. 343; Style, 453; 3 Lev. 50. Since the statute of 11 George II. assumpsit has lain, as well for implied as express agreements, to pay for the use and occupation of lands, and it is now a common remedy, both in England and in the United States. 3 Stark. Ev. 1512; 1 Swift Dig. 417; 3 Ohio, 264; 1 Munf. 407; 4 Day, 299; 1 Bay, 315, 443; 14 Mass. 95, 97.

But the question here occurs, whether the facts in the case are such that we can recover in this form of action; for it has been denied in the case of *Sinnard v. McBride, Adm'r*, 3 Ohio, 264, before cited, that action for use and occupation, lies in favor of the lessor of the plaintiff, in ejectment, for rent that accrued subsequent to the demise laid in the declaration in ejectment, and the reason is, because, by bringing the ejectment, the plaintiff has elected to consider the defendant as a trespasser, and is estopped by the record from denying it: "he can not blow hot and cold at the same time;" but it is very distinctly stated in the same case, "that the law seems well settled that after a recovery in ejectment, assumpsit will lie for mesne profits, anterior to the demise; and there are certainly very strong reasons why it should, especially in favor of an administrator, who would otherwise be without remedy. Equitably, every one who enjoys the property of another, with or without his consent, tortiously, or with his permission, ought to be accountable to the owner for the use of it, either before or after ejectment; and the defendant ought not to be permitted to set up his own tortious acts, in assumpsit, to defeat the action for the use and occupation of land, any more than in actions relating to personal property, where, beside the injury, property is acquired, which benefits the defendant's testator. In

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the one case as in the other, the party injured, ought to be allowed to waive the tort, and bring an action *ex contractu*; and it is believed that, upon an examination of the authorities, it will be found that the reason of the rule, *which obliges the owner [207 to bring ejectment against a person in possession of lands, claiming adversely, so far as it is declared, or is apparent from the reported cases, is not that the cause of action will not admit of a remedy in form *ex contractu*, any more than the receiving of the money of another, without his consent, is such cause; for the bare enjoyment of the quiet possession of the lands of another, without his consent, is no more a wrong, a tort, or an injury, which arises *ex delicto*, or *ex mali facie*, than it is to receive the money of another without assent. There are too many causes of action which will lie in form, either *ex delicto*, or *ex contractu*. Such, on the one hand, are actions in case founded upon contract, where the contract itself is considered merely as inducement to the action, and the gravamen is the breach, considered as a tortious negligence; so, on the other hand, the unlawfully converting of the goods of another, to one's own use, is a tort, though the real injury to the plaintiff is the loss of property which the defendant has gained, for which an action of assumpsit will lie after the death of the wrong-doer. Lord Mansfield, Cowp. 376.

The true reason is, that the plaintiff shall not be allowed to bring such action until after he has established his right to possession by an action of ejectment, for the action for use and occupation is not well calculated to contest the title to lands, and it would often impose a hardship upon the defendant, by not apprising him of what he is called upon to defend. So assumpsit will not lie to recover money paid for the return of cattle, wrongfully distrained, and for the same reason. Cowp. 411; 2 Stark. Ev. 111. The action of ejectment is peculiar in its kind, and is well adapted to the recovery of lands. The right to possession is put directly in issue, and if the plaintiff had it at his option to adopt a different remedy, that puts in issue, not the right of the plaintiff to the possession of the premises, but a fact which might, possibly, be independent of it; it would not only impose great difficulties on him in trying his title, but it would, in a great measure, supersede the benefits of the action of ejectment, and be introductory of a new law.

Therefore, it is incumbent on the plaintiff, in actions for use and

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occupation, to show that the defendant was his tenant, and went 208] into possession with his permission or license, *has attorned, or done that which is tantamount by our law; or has recovered in ejectment, for, by either of these acts, the title is put at rest; and this was expressly declared to be the reason why ejectment must be brought against the possessor, holding adversely, at the Worcester Spring Assizes, 1788, in the case of Cunningham et ux. v. Lawrents, Bac. Ab. 160. That was an action of assumpsit for use and occupation against a defendant, who claimed adversely. Wilson, Justice, nonsuited the plaintiff, and was of opinion that the mode of proceeding was by ejectment; or, in case that could not be brought by an action against the tenant for the rent wrongfully paid by him to the person not entitled to it; and, indeed, it is obvious that questions may arise which the defendant could not be prepared to meet or control. See also 2 Cranch, 344, 345. After ejectment brought, the plaintiff is estopped from saying that the defendant undertook and promised to pay rent subsequent to the demise, because he has already said, and put it upon the record, that the defendant, with force and arms, etc., entered. But upon what principle is it that the plaintiff is allowed to recover for a time anterior to the demise, except it be that, as the plaintiff has established his title and right to possession by ejectment, the law raises the assumption? It surely can not make the possession anterior to the demise any the less tortious, that the plaintiff has subsequently recovered possession. The true reason is, that the title having been ascertained, the law raises the promise by implication. Thus the court, in 3 Ohio, say, "the reason of the distinction is evident. In the former case the presumption of a contract is not excluded; in the latter case it is. A man can not hold by agreement and as trespasser at the same time, though for a part of the time he may hold by agreement, and for the residue as a trespasser." See also Peake's Ev. 258; Bul. N. P. 133, and *infra*. 113. Also, 4 Burr. 1984, that in an action for use and occupation by a stranger, the title can not be tried. In the case now before the court, the defendant has estopped himself from saying that the title is not in us, for it is admitted to be in the plaintiff, and that he has recovered in ejectment against one of the tenants who hold under the same claim of title. No issue can be made upon it, so that the case, in relation to that part of the premises for which no 209] ejectment has been *brought, stands precisely the same as

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If we had recovered in ejectment, and the demise were laid at the time of defendant's testator having left the premises. The manner of proving the title in us can not alter the right.

Whether the defendant acknowledged the title is in us, on the records, as he has, or whether he acknowledged that we had recovered in ejectment, or whether he produce the record of ejectment in court, is all one. So, too, if the defendant acknowledge tenancy, or that he has paid rent, or that he has attorned, which is the same as acknowledging title in the plaintiff, as we have no attornments; in either case the title would be out of the question, either by the acts which imply a disclaimer of the title, or expressly by his deed or declaration.

But it is not necessary for us to show that the action will lie against the parties to the injury in its present form, for it is conceived that where the cause arose out of property, and was not a personal tort, but was such an injury whereby the defendant had received a benefit in estate, although during the lives of the parties no other than an action *ex delicto* would lie, yet that subsequent to the death of either of them the representative may bring an action in form, *ex contractu*; and the court in the case in 3 Ohio, above cited, recognized the doctrine laid down by Lord Mansfield, in the case of *Hambly v. Trotter*. They say: "The action of assumpsit is often sustained when there is not, in fact, any agreement between the parties. The proper action against a common carrier is on the custom of the realm, which is a sort of tort; but after the death of the carrier, assumpsit may be maintained against his representatives. So trover, which is for a tort, is the proper remedy against one, who unlawfully converts the goods of another to his own use; but after the death of the wrong-doer, assumpsit, for the value of the goods, will lie against the executor, but this must be when the facts are such that an agreement may be presumed. So if a man take the horse of another, and bring him back again, an action of trespass will not lie against his executor, though it would against him; but an action for the use and hire of his horse would lie against the executor." Lord Mansfield, Cowp. 375. The fact that this is an action against an administrator is a feature which distinguishes this case from those of ordinary occurrence and from necessity, and to [210] do justice ought to have much weight with the court.

Again, the statement of facts, in the agreed case, shows that we

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have recovered a part of the premises in ejectment, and we claim to be entitled to recover for all the time the defendant's testator enjoyed the possession previous to the recovery in ejectment. The agreement only states the bare fact that we had recovered a part of the premises of a tenant of Bixbe's. It does not show that we have ever admitted the defendants to have been trespassers, on the record, except at the time of the recovery. It is altogether too vague and uncertain to determine anything else in relation to the ejectment, except that from the manner in which the agreement is drawn, it would appear that the defendant's testator occupied the premises a number of years.

In the case in Ohio Reports, already quoted, we see the court have refrained from any remarks on section 71 of the statute, page 65, from which we draw the conclusion that it was supposed that the action of assumpsit for mesne profits survived to the administrator at common law, in which case it could have no bearing on the question; and such, indeed, is evidently the decision as it respects the use of lands previous to the demise. We will, however, venture to offer our views on that section of the statute. It will be seen that it only has relation to the cause without prescribing the form of the action, though it descriptively provides that such cause, for which an action on the case will lie, shall survive to the administrator if it were an injury to property. But we think the cause of action, which the statute makes to survive, is not confined to such cause only, for which an action on the case would have been sustained against the decedent.

No sense can be made of the statute, according to its present punctuation, without supplying the words "or trespass," immediately after the first comma in the section. Independent of the reason that there was as much need of legislation to provide that causes, for which trespass would have been supported, shall survive, as there was to make that provision in the case of causes, for which trespass on the case would have lain against the testator, and with as much justice, too, there exists sufficient evidence [211] that the sense is *incomplete as it now stands. The section immediately preceding provides that when an action of trespass, or trespass on the case, shall have been commenced and the party died, etc. Why omit trespass in cases where no suit has been commenced?

But the occurrence of the words, "either of said actions," in same

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section 71, and which have relation to the actions, the causes of which shall survive, prove beyond a reasonable doubt that one of the actions is left out, which causes the disagreement in number. If this construction be right, and if the statute only has relation to the cause, without providing that an action, in form *ex delicto*, may be brought thereon; and as actions in form, *ex delicto*, requiring pleas of not guilty, which is said to be decisive when brought by or against an administrator, do not survive at common law, the statute would remain a dead letter unless we were allowed to adopt this form of action. It would be inoperative because, by the statute the form doth not survive; and by common law, because the subject matter or injury doth not survive.

COWLES, for defendant:

The action of assumpsit, for use and occupation, would not lie at common law. It is given by the statute of 11 George II., ch. 19, sec. 14; this is the English law, and the law in some of the states, especially in the State of New York, where the English statutes have been adopted. This action will not lie unless where the relationship of landlord and tenant exists, or can be traced, founded upon some agreement expressed or implied. 2 H. Black. 319; 6 Johns. 46.

The action for use and occupation has been sustained and acquiesced in, in this state, from the equitable principle that where there is evidence of a contract or license for the enjoyment of real estate, although by parol, and the party has quietly held and enjoyed the premises beneficially for himself, it is reasonable that he should pay rent for the same. It was a long time doubted by the bar and the courts whether this action could be sustained, in this state, upon any parol agreement express, being considered within the provisions of the statute requiring estates and lands to be assigned and *granted by deed or note in writing; but the courts [212] considering the quiet enjoyment as part performance, and furnishing evidence of a license or contract on that ground, have sustained the action. This action never has been sustained unless there was evidence of a contract express or implied. Even where the party took possession by purchase, it was held that the action could not be sustained. 6 Johns. 46.

Wherever the circumstances of the case show that the party has held and occupied in any other manner than under a contract ex-

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press or implied, it has uniformly been decided that this action would not lie; and especially in this case it can not be sustained where the possession of the intestate was, as to the plaintiff, tortious and adverse; having entered under a title adverse to the plaintiff, he was considered as a trespasser during his occupation of the premises; and the facts stated in the agreed case show that the plaintiff recovered the possession in an action of trespass in ejectment.

There is not only the want of matter showing an agreement, but the case itself furnishes the proof of facts which estops the plaintiff from presuming it. As the plaintiff has treated the intestate as a trespasser, he can not, at the same time, consider and treat him as a lawful tenant, and recover the rents and profits of his representative in this form of action.

The court will not consent to prostrate the ancient landmarks designating the different forms of actions, *ex contractu* and *ex delicto*, and extend the action of assumpsit as the universal remedy. The plaintiff's case is unsupported by any case in the books or *dictum*, except the *obiter dictum* of the judge in the case of *Sinnard v. McBride*, Adm'r, 3 Ohio, 264, which opinion is unsupported by any authority there cited, or to be found in the books. It was a mere *dictum* in a case *coram non judice*.

The court are referred to 13 Johns. 297; 15 Johns. 508, where the decision of the case of *Smith v. Stewart*, 6 Johns. 46, is recognized, and the principle well settled that this action can not be sustained. If the plaintiff is without remedy, he has only to apply to the legislature of reform, and they will afford it. The plaintiff's counsel will not pretend that he is supported by any [213] authority in the books, but only *the court to innovate upon the law as well settled, to extend unto him this extraordinary remedy.

By the Court:

It seems well settled that a plaintiff, after a recovery in ejectment, can not, in assumpsit, for use and occupation, recover rents and profits, accruing after the date of the demise in the declaration. 1 Term, 378; 3 Ohio, 264; Woodfall's Ter. L. 432. Bixbe entered claiming title, and not as tenant. This action, by statute 11 George II., ch. 19, sec. 14, lies upon an implied agreement to pay rent. To create the relation of landlord and tenant, an agree-

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ment, either expressed or implied, must exist. Presumptive evidence will do, such as that the defendant holds over after the expiration of his lease by parol. *Osgood v. Dewey*, 13 Johns. 240; 3 Stark. Ev. 1516; 13 Johns. 297.

But the facts must show, expressly or impliedly, that the defendant occupies as tenant of the plaintiff. In the case of *Smith v. Stewart*, 6 Johns. 46, the defendant took possession of lands as a purchaser from the plaintiff, and by his consent, but afterward refused to pay, and abandoned the contract. The court say, as the defendant did not enter under the relation of tenant, but under a contract for a deed, the plaintiff could not recover in this form of action. The same principle was decided in the case of *Bancroft v. Wardell*, 13 Johns. 489; 1 Esp. N. P. 20; *Woodfall's Term Law*, 432; 3 Serg. & Rawl. 500; 17 Mass. 299; 2 Green. 337; 1 Munf. 407; 3 Dall. 503. These authorities establish the principle, that when a person occupies the land of another, not as tenant, but adversely, or, where the circumstances under which he enters, show that he does not recognize the owner as his landlord, this action will not lie. The remedy is trespass for mesne profits, after a recovery in ejectment.

It has been determined that a defendant can not in this action dispute the title of the plaintiff, and that *nil habuit in tenementis*, is a bad plea. *Lewis v. Willis*, 1 Wil. 314; *Cook et al. v. Loxley*, 5 Term, 4; 2 Wils. 208. In the principal case, the facts admit that Bixbe entered claiming title. This surely rebuts the implication of the relation of landlord and tenant.

*There is no express contract to pay rent; consequently [214 the plaintiffs can not recover on the facts before the court.

Judgment of nonsuit.

MARIA ABRAMS v. HIRAM KOUNTS AND JOHN QUINN.

Where a bond recites that the obligors "are held and firmly bound, in the penalty of a thousand dollars, for the performance of a marriage contract, which said H. K. engages to perform with M. A.," the thousand dollars must be deemed a penalty, and not liquidated damages. Covenant does not lie upon such a bond.

THIS cause was adjourned here for decision from the county of

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Columbiana. It was an action of covenant founded upon a sealed writing, in the following words:

"Know all men by these presents, that we, Hiram Kounts and John Quinn, of the county of Columbiana, and State of Ohio, are held, and firmly bound, in the penalty of one thousand dollars, for the true performance of a marriage contract, which the said Hiram Kounts engages to perform with Maria Abrams, of Brooke county, Virginia, against the 8th day of February next. The conditions of the above obligation are such, that if the above bound Hiram Kounts does well and truly perform the above obligation, this obligation to be void, otherwise, etc." Dated, January 22, 1827.

The declaration contained six counts. In all, the capacity of the plaintiff, as a *feme sole*, to make a contract of marriage is averred. In some, a promise on the part of the plaintiff to marry the defendant Kounts, is averred; in one, this is omitted; in one, a mutual promise is set out; and in the second count it is averred, in addition, that the defendant Kounts, by promise of marriage, had seduced the plaintiff, in consequence whereof, at the time of making the contract, she was pregnant. As no exception was taken to the form of the declaration, it seems unnecessary to describe it more minutely.

To all the counts but the second, the defendants demurred generally, and the defendant joined in demurrer. To the second count the plaintiffs pleaded three separate pleas, alleging that Kounts was imprisoned by the plaintiff, and by duress was induced to make and execute the bond. Upon these replications the plaintiff joined issue. The cause was adjourned here for decision upon the demurrers.

LOOMIS & METCALF, in support of the demurrer :

We contend that the plaintiff can not recover, upon any of the counts, to which the defendants' demurrers, in the present state of the pleadings, apply. Those counts are, we conceive, radically defective in various particulars. There is not, in the instrument upon which the plaintiff has counted, and which is spread upon the record, in the defendants' demurrer, any covenant on the part of Kounts and Quinn both, with Maria Abrams, the plaintiff, or any other person. This objection is believed to be fatal. A covenant, on the part of Kounts alone, can not be made the foundation of a

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joint action against him and Quinn. The case made upon the pleadings, would be variant from the evidence adduced to support it. A joint recovery can never legally rest upon evidence of a several liability. There is a defect in the instrument upon which the plaintiff has declared, that can not be supplied by averment and parol proof. There is a want of title in the plaintiff, which can not be supplied without changing essentially the legal operation and effect; without adding to, and altering the written instrument, which is the sole support of the plaintiff's action. This the law will not tolerate. *Grun v. Horne*, 1 Salk. 197; *Croke Jam.* 505; 1 Phillip's Ev. 433, note; *Grant v. Naylor*, 4 Cran. 224.

It appears manifest to us, that an action of covenant can not be supported on the instrument before mentioned, against the defendants jointly, for other reasons. This court has decided, in the case of *Huddle v. Worthington*, 1 Ohio, 423, that an action of covenant can not be supported upon the condition of a bond, separated, in the pleadings, from the penal or obligatory part. An action of covenant could not, in this case, be supported upon the condition, unconnected with the penal or obligatory part of the bond, as there is nothing to distinguish this, so far as it relates to the condition of the bond, from the case of *Huddle v. Worthington*. In that case, an action of covenant, probably, could have been supported upon the penal and obligatory part of the *bond, as it is alleged, [216 in the report of the cause, to have been in the usual form. But in this case, it is submitted that an action of covenant, upon the penalty of the bond, could not be maintained. There is no covenant or agreement in the penal part of this bond to pay, but the mere acknowledgment of a debt, or duty. Although the line of demarkation between the actions of debt and covenant, may, in some instances be narrow, still it is clear and well defined in the books. We take the law to be this: when there is a mere acknowledgment of a debt or duty, there debt only will lie; when there is an agreement, or a man obliges himself to pay, or do any other act, then covenant can be sustained. This distinction is supported by principle and authority. *Harden*, 178; 2 Bacon Abr. 63, note, Covenant, A.

If an action of covenant can not be maintained upon the penalty of this bond, nor upon the condition unconnected, in the pleadings, with the penalty, we confess ourselves at a loss to discover upon

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what reason, principle, or authority it could be maintained upon both together.

Several objections apply to the counts separately. To the first, it is objected that it alleges no covenant on the part of Kounts and Quinn both. It states, after setting out the instrument, that Kounts, by the instrument, bound and obliged himself to marry the plaintiff, against February 8, 1827, and assigns for breach that he has not married her, nor he, or Quinn, paid the sum of one thousand dollars. In the count there is not a sufficient title set forth, nor is there a joint covenant or liability averred. The legal effect of the instrument set forth is averred to be an obligation by Kounts to marry the plaintiff. Such, we admit, if it have any, to be the true and only legal effect of the bond. No covenant by Kounts and Quinn both, either that Kounts should marry the plaintiff, or that he and Quinn jointly should, in the event of his failure to do so, pay the plaintiff one thousand dollars, as averred in that count. The breach assigned is therefore too broad. It negatives the performance of a covenant not previously alleged in the count to have been made.

The third count, after setting out the obligation, alleges that Kounts thereby became bound to marry the plaintiff, on or before 217] February, 1827, or, on failure thereof, *that Kounts and Quinn would pay the plaintiff the *sum of one thousand dollars as damages; the breach is, that Kounts has not married the plaintiff, nor he or Quinn paid the one thousand dollars. The averment that Kounts and Quinn agreed to pay one thousand dollars as damages, is beyond the terms of the obligation. The obligation contains *eo nomine*, a penalty; the averment makes it a case of agreed and liquidated damages. A jury, under this averment, could give no less than one thousand dollars; they would have no discretionary power, no proof could be adduced in mitigation of damages. It is not alleged in this count that the defendants covenanted or agreed with the plaintiff; it is not, in truth, alleged that Kounts and Quinn covenanted at all, but merely that Kounts covenanted to marry the plaintiff, or on failure thereof, that he and Quinn would pay her a thousand dollars as damages. The breach, in this count, is defective upon the same ground as that in the first. That this is not a case of agreed damages, we think too clear to admit of doubt. The parties have themselves denominated it a penalty, and there is nothing discoverable in the contract to induce a belief that they

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intended anything different from the natural and ordinary acceptance of the terms which they have used, or that would justify the court in deviating from the ordinary interpretation of those terms. We shall not go into an elaborate argument on this point, until we shall have discovered from the reasoning and authority that may be urged and adduced by the plaintiff's counsel, the propriety at least, if not the necessity, of such a procedure. *Smith v. Dickinson*, 3 Bos. & Pul. 630.

"Where a sum is expressed to be a penalty, it will not be considered to be liquidated damages." 1 Swift's Dig. 680, and authorities there cited.

The fourth count alleges, that Kounts and Quinn bound themselves to the plaintiff under the penalty of one thousand dollars, that Kounts should perform a marriage contract with her, against February 8, 1827, and if not, the obligation for the penalty of a thousand dollars should remain in full force. Breach, that Kounts has not performed the marriage contract, nor he and Quinn, or either of them, paid the thousand dollars. There is a fatal variance between this count and the obligation set out on oyer. The count states *that the defendants bound themselves to the plaintiff [218 under a penalty, and the obligation does not show that they bound themselves to the plaintiff or any other person. The obligation is not, in this count, set forth according to its legal effect. It is not averred that Kounts and Quinn covenanted to pay the plaintiff a thousand dollars in any event, consequently the breach assigned is not warranted by the facts previously alleged.

The fifth count charges that the plaintiff and Kounts had mutually agreed to marry, and that Kounts and Quinn agreed, and firmly bound themselves in the penal sum of one thousand dollars that Kounts should perform the aforesaid marriage contract against February 8, 1827, and on his failure that the said obligation for one thousand dollars should remain in full force and virtue. Breach, that Kounts has not married the plaintiff, nor he and Quinn paid the one thousand dollars. The plaintiff's counsel has, in this count, gone entirely beyond the terms and legal effect of the obligation. He has averred facts that do not exist in the obligation. To admit such averments would be, in effect, to make a new contract for the parties, and to prostrate legal principles well established. The contract of the parties, and their intention, ought to be gathered from the obligation, and from that only.

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There is not a word in the obligation relative to a previous marriage contract between the plaintiff and Kounts, nor does it contain a covenant to perform any previous contract. The averments in this behalf are, therefore, gratuitous and unwarranted. It is not charged in this count that the defendants covenanted or agreed with, or in any manner bound themselves to the plaintiff. There is, consequently, a total defect of title in the plaintiff apparent upon the face of the count.

In the sixth count, it is alleged that Kounts and Quinn promised and bound themselves, among other things, that Kounts should, against February 8, 1827, marry Maria Abrams, by the name of Maria Abrams, of Brooke county, Virginia. Breach, that Kounts has not married her. The decision in *Huddle v. Worthington* is conclusive against the validity of this count. No title whatever in the plaintiff is alleged. It is not shown that the defendants covenanted with her or bound themselves to her.

219] *The demurrers to all the foregoing counts, it is believed, ought to be sustained, as well on account of the general exceptions taken to the action, as the specific objections to the individual counts.

GOODENOW, for plaintiff:

The first point, which the counsel for the defendants seem to raise, on the construction of the obligation, is, that it contains no covenant, by both the defendants, with the plaintiff; that there is no joint, but a several liability. This objection, if valid, would defeat the plaintiff, in any form of action against both the obligors; and, of consequence, against either, except covenant against Kounts, on the covenant to marry; and how such a separate liability would be enforced, on this instrument, I can not conceive, unless by a bill in equity for a specific performance.

I can hardly think it is necessary for me to quote authorities, on the question, what words will create a covenant; or in what manner an instrument, like the present, is to be construed; nevertheless, I will refer the court to the long-established doctrines on the subject, as they are given to us in the best authors.

"The law does not seem to have appropriated any set form of words, which are absolutely necessary to be made use of, in creating a covenant and, therefore, it seems that any words will be effectual for that purpose, which show the parties' concurrence to the performance of a future act." 1 Bac. Abr. 527; Hallet v.

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Wylie, 3 Johns. 44; Harris v. Nicholas, 5 Munf. 483; Doug. 27, 766; 1 Roll. 518, l. 50.

Every party to a deed, who is interested in the covenants therein, is entitled to his action. 6 M. & S. 77; 3 B. & B. 335; 5 D. & R. 234.

The right of action follows the interest in all cases, 1 Saund. 155, c; and it lies for any liquidated sum. 1 Saund. 241, n. 5.

A covenant shall be expounded with regard to the context and intent of the deed. R. Hob. 275; 6 Johns. 49; 1 Johns. Cases, 319; 10 Johns. 266.

"All contracts are to be taken according to the intent of the parties, expressed, by their own words, and if there be any [220] doubt, in the sense of the words, such construction shall be made as is most strong against the covenantor, lest, by the obscure wording of his contract, he shall find means to evade and elude it; hence if A. (Lev. 102; Sid. 151; Kel. 511) covenants with B. that if B. marries his daughter, he will pay him twenty pounds per annum, without saying for how long, yet it shall be for the life of B., and not for one year only; for by the words, 'per annum,' the meaning of the parties appears to be, that it could continue longer than one year; and this is the construction that is most strong against the grantor." 1 Bac. Abr. 539.

Again, it is objected, that the action of covenant will not lie on the penal part of this bond, because it contains a mere acknowledgment of a debt or duty. Suppose I grant this position, what follows? Why simply this, that, had I brought covenant on the penalty alone, I could not recover. It will be time enough to combat this position when my case shall present it. The law which the gentlemen, on the other side, lay down to defeat our recovery, in covenant, is this, that, "when there is a mere acknowledgment of a debt, or duty, there debt only will lie; where there is an agreement, or a man obliges himself to pay, or do any other act, then covenant can be maintained." In reply to this, Chitty says, 1 Chit. Pl. 111, "Covenant appears, in general, a concurrent remedy with debt, for the recovery of any money demand, where there is an express or implied contract contained in the deed, and it has been holden that an action of covenant is sustainable on a bond, though debt is now the usual remedy." See also 1 Swift's Dig. 570, 571. But grant the doctrine advanced by my friends to be good sound orthodoxy, and how does it apply to the instrument.

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of contention between the two parties? Kounts and Quinn acknowledge themselves "hold and firmly bound (in the penalty of one thousand dollars), for the performance of a marriage contract, which the said Hiram Kounts engaged to perform with Maria," etc., that is, both covenant that one shall perform his engagement with the covenantee. Does not this come, even without the condition of the obligation, within the express terms of the gentleman's definition of what he says would sustain an action of covenant? I am yet to learn that two can not oblige themselves in an 221] instrument under seal * "for the performance" of a "duty" by one of them, and thereby render themselves liable in an action of covenant.

The most important question, however, and one that will undoubtedly require much attention, is, whether the thousand dollars, which, in the fore part of the obligation is called by the parties a "penalty," is to be considered in the nature of a penalty merely in the technical sense of the word, or whether that sum is not to be taken as liquidated damages between the parties? I think, perhaps, a like instrument was never presented to a court for decision. No man, peradventure, ever bound himself with security to perform a marriage contract; but, if others had done so, they probably would have used, especially if they did not employ lawyers to draw their instrument, just such language with a little different collocation, perhaps. But I know not why a female may not demand and receive security from a slippery suitor to compel him to marry her, or forfeit a portion of his estate, to which she would succeed if he led her to the altar. And, it seems to me, that this case is one of the first impression, and calls upon the court to look astutely into it, and discover, if possible, "the intent of the parties." If they seek for the intention of all parties, they can not, I think, hesitate to say, from the nature of the transaction and the situation of the parties, that the plaintiff would never have received the obligation from Kounts, if the condition had been what his counsel now contends it must be construed to be, as follows: "*Provided*, if the said Hiram shall not perform his marriage contract with the said Maria, he shall pay her whatever damage she may thereby sustain, and on his failure to pay, the said Quinn shall pay for him." Nor will the court, for a moment, believe that Kounts or Quinn so intended the condition to be understood; unless the court can suppose them both, at the time of executing the

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obligation, to be governed by a fraudulent design upon an innocent deluded girl, and even then, the court would not permit them thus to avail themselves of the advantage of their own fraud.

"The same sense," says Lord Ellenborough, in *Seddon v. Senate*, 13 East, 74, "is to be put upon the words of a contract in an instrument under seal, as would be put upon the same words in any instrument not under seal; for the same intention must be collected from the same words of a contract *in writing, [222 whether with or without seal;" and Judge Bayley added, "a covenant is nothing more than an agreement, in construing which, we have only to look to the fair meaning of the parties." That this is sound doctrine, and the only correct principle upon which to construe all contracts, I think no one will deny. Hence, the court will control words, and even phrases, of an ambiguous or technical meaning, whenever they become irreconcilable, or repugnant to the "fair meaning" of the parties. Hence, even the word "penalty" has been held not to be used, in its technical sense, in an instrument before the court, but construed to mean agreed damages, and the phrase, "liquidated damages," has been controlled and construed to mean a penalty.

The general current of authorities on this subject will be seen in the following cases: 3 B. & A. 692; 4 Burr. 2229; 13 East, 343; 1 W. Blk. 395; 1 Camp. 78; and in *Astly v. Weldon*, 2 B. & P. 353, Judge Heath said: "It is very difficult to lay down any general principles in cases of this kind; but I think there is one that may be safely stated. Where articles contain covenants for the performance of several things, and then one large sum is stated at the end to be paid upon breach of performance, that must be considered as a penalty; but where it is agreed that if a party do such a particular thing, such sum shall be paid by him, there the sum stated may be treated as liquidated damages." And Chambers, Judge, observed, "There is one case, in which the sum agreed for, must always be considered as a penalty, and that is, where the payment of a smaller sum is secured by a larger." Where the word penalty remains uncontrolled by other words, or the nature and circumstances of the case, it will be taken in its technical sense, as in 3 Bos. & P. 630; 13 East, 345. So, also, as to the phrase, liquidated damages; but in deciding the point, the whole of the agreement and evident intentions of the parties must be consulted (6 B. & C. 222); in this last case (*Davies v. Penton*), the

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court controlled the agreement of the parties, and held what they had called liquidated damages as a penalty. The distinction, which I think runs through all the authorities, and seems to be sustained by reason and common sense, is this, where the duty, or act, to be performed or omitted, the benefit of the duty, or act, or 223] the injury resulting from its neglect, can be *measured in the ordinary way of estimating advantages and disadvantages, losses and gains; or, we might say, where we can bring the non-performance to be measured by the universal standard of worth in this world, *money*; there the sum agreed on may be taken as a penalty in the technical sense. But where the non-performance of an agreement, or covenant, in its consequences addressed to the forum of feeling, character, standing, or future peace and happiness of the covenantee, the sum agreed upon must be considered as the rule of damages, or as liquidated damages.

It seems to me preposterous, in this case, to impanel a jury to ascertain the damages the plaintiff has sustained, by the defendant, Kounts, not marrying her. She had received him to her bosom—he had deceived her; to atone, as far as it was possible for him to do it, for the injury he had inflicted upon her character, her feelings, and her peace of mind, he bound himself in solemn promise to marry her, or forfeit one thousand dollars. She could not enforce a specific performance, for he had his option to marry, or pay the thousand dollars. Not so with her—she had no option. When he chose, he might turn upon his heel and take his leave; but she was bound to accept his hand whenever he offered, or refuse, and waste her life in irretrievable wretchedness.

I will refer the court to one other authority, and I have done. The opinion of Lord Hardwicke, in *Roy v. Duke of Beaufort*, 2 Atk. 190, is directly in point. A judgment had been recovered on the "penalty" of a bond, for one hundred pounds, conditioned that the obligor would catch no more fish, etc., which condition was broken by catching two flounders, worth two pence only; and this suit in equity was brought to reduce the penalty to the actual damage. Lord Hardwicke says, "as to the head of security, it is most absurd to think that bonds of this kind (which was in a penalty) were intended merely as a security, and that nothing is to be recovered upon them. I am of opinion that when this sort of bonds are given, by way of settled damages, it is unreasonable to imagine they could only be intended as a bare security that

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the obligor should not offend for the future; was this the case, in what respect is a party in a better condition who has such a bond, than he was before?"

And I may emphatically ask, in what respect is Maria in a better condition than she was before she received this *bond, [224 if she must still rely upon a jury to ascertain the worth of a marriage contract with Hiram Kounts?

LOOMIS and METCALF, in reply:

The plaintiff's counsel, in reply to our opening argument, has referred the court to many authorities, the correctness and soundness of which we are not disposed to question. It is conceded that the "law does not seem to have appropriated any set form of words, which are absolutely necessary to be made use of in creating a covenant;" that "every party to a deed, who is interested in the covenant therein, is entitled to his action;" that "the right of action follows the interest, in all cases;" and that "a covenant shall be expounded with regard to the contents and intent of the deed." We admit, also, that "all contracts are to be taken according to the intent of the parties, expressed in their own words," and that they are to be construed most strongly against the grantor, in relation to the quantum of interest, which shall be adjudged to pass by the contract. But the admission of these positions does not, in our view, affect, or invalidate the objections taken, in our former argument, generally to the action, or specifically to the several counts. The authority quoted from 1 Chitty does not controvert our position, that covenant can not be sustained in this case. Chitty appears to speak with surprise that the courts had gone so far as to determine that covenant could be sustained on the penalty of a bond, in the usual form, and immediately adds that "debt is now the usual remedy." The penal part of this bond is not in the usual form. It is a mere acknowledgment of a debt; no obligee named, nor any obligation of payment to any one expressed. The defendants jointly, neither agree, oblige themselves, or covenant, that they, or either of them, shall do any particular act. Kounts, and he alone, covenants. This case stands upon entirely different grounds from those where parties enter into covenants, and there bind themselves, in a penalty, for the performance of those covenants. In such case, covenant may be sustained upon the express covenant contained in the contract, or

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debt upon the penalty, by which the performance of the covenants is secured. Such is the case in 1 Swift Dig. 570, 571.

225] *It is, to our surprise, contended that this is a case of agreed damages, and it is alleged in support of that fact, that a "like instrument was never presented to a court for decision;" that "this case is one of the first impression; and calls upon the court to look astutely into it, and discover, if possible, the intent of the parties." Singular reasons, indeed, for adjudging it a case of agreed damages. The intention of the parties seems to be supposed doubtful, and difficult to be ascertained, and yet the court are asked to give the contract the severest construction. We had supposed the court would never, in a doubtful case, determine a penalty to mean liquidated damages; but that in such a case they would rather send the parties to a jury, the appropriate forum, to determine what damages the plaintiff had sustained. By the latter mode no hardship would be imposed upon the plaintiff; by the former, great injustice might be done to the defendant. The case must be perfectly clear and unambiguous that could justify any court in giving to the term "penalty" any other than its ordinary signification—a security for the performance of a contract, or, in the event of a non-performance the payment of such damages as the party shall have actually sustained, by reason of the non-performance. In this sense, almost every person in community understands the term; and probably not one person in a hundred ever heard or imagined that it ever was construed to mean liquidated damages. In ninety-nine cases of a hundred the construction contended for would ensnare the parties, and work injustice. It seems to be supposed that no motive can be assigned for the plaintiff's taking the bond, and that no benefit can be suggested as secured by it, unless the plaintiff's construction prevail. There is, in our apprehension, no difficulty in assigning motives for her extorting it, nor in suggesting advantages to be secured by it. First, it would be supposed to contain, in itself, clear and permanent evidence of a marriage contract. Second, the performance of that contract would be supposed more effectually secured by the liability and responsibility of Quinn.

The question whether the sum of one thousand dollars, mentioned in the bond, is to be regarded as a penalty, or as liquidated damages, depends, we admit, upon the form of the instrument, and

226] the intention of the parties, as collected *from the whole of

the instrument. If the sum be mentioned simply under the denomination of a penalty, the form of the instrument imports it to be a mere penalty, and the presumption is, that the parties did not contemplate liquidated damages. 3 Stark. Ev. 1131. The inference of a contrary intent must be perfectly clear to counteract this presumption, if, indeed, it can be counteracted in any case. Although the term of the instrument, *prima facie*, import liquidated damages, they will not be considered as such if a contrary intention be manifested from the whole of the instrument. Thus, although the agreement concluded in this form: "Lastly, it is hereby agreed that either party, refusing to perform their undertaking, shall pay to the other two hundred dollars," although this appeared to be contract and no penalty, the court held that they were to look to the whole of the instrument. 3 Stark. Ev. 1131.

Chitty, in his treatise on Contracts, p. 335, says: "It may be safely remarked that the courts have shown an inclination to view, if possible, the sum reserved, as in the nature of a penalty, rather than as stipulated damages."

Lord Eldon, in the case of *Astley v. Weldon*, 2 B. & P. 350, in commenting upon the case of *Sloman v. Walter*, 1 Brown's Ch. Cas. 418, remarked that in that case, "by the very form of the instrument, the sum appeared to be a penalty, in which case a court of equity could never consider it as liquidated damages, but must direct an issue of *quantum damnificatus*." This is a strong authority against the *dictum* contended for by the gentleman opposed to us, and so far as the opinion of that distinguished jurist, Lord Eldon, is entitled to consideration, is conclusive. The power and duty of courts of law and equity, in relation to the chancerying down the penalties of bonds, are now precisely alike, and whenever a chancellor would be bound to direct an issue of *quantum damnificatus*, a court of law ought to direct an assessment of damages, by jury, upon the same principle.

Our opponent appears to us to have been unfortunate in quoting the case of *Lowe v. Peters*, 4 Burr. 2225. That was, in terms, a case of agreed damages. It could receive no other construction. But what says Lord Mansfield, in his opinion, in that case? He remarks, p. 2228, that "there is a difference between covenants in general, and covenants *secured by a penalty or forfeiture. [227 In the latter case the obligee has his election. He may either

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bring an action of debt for the penalty, and recover the penalty, after which recovery of the penalty he can not resort to the covenant, because the penalty is to be a satisfaction for the whole; or, if he does not choose to go for the penalty, he may proceed upon the covenant, and recover more or less than the penalty *toties quoties*. And upon this distinction they proceed in courts of equity; they will relieve against a penalty upon a compensation; but where the covenant is to pay a particular liquidated sum, a court of equity can not make a new contract for a man, nor is there any room for compensation or relief. As in leases containing a covenant against plowing up meadow, if the covenant be not to plow, and there be a penalty, a court of equity will relieve against a penalty, or will even go further than that, to preserve the substance of the agreement; but if it is worded to pay five pounds an acre for every acre plowed up, there is no alternative, no room for any relief against it, no compensation; it is the substance of the agreement." This language is plain, direct, and unequivocal. The line of separation of cases of penalty from cases of liquidated damages is clearly laid down. The law is here settled upon a rational foundation, and strong must be the authorities that shall overturn the decisions of such jurists as Eldon and Mansfield.

The following decisions, in this country, of which we have not leisure to give an analysis, strongly corroborate the view which we have taken of this question: *Dennis v. Cummins*, 3 Johns. 297; *Stearns v. Barret*, 1 Pick. 451; *Perkins et al. v. Lyman*, 11 Mass. 76; *Merrill v. Merrill*, 15 Mass. 488.

The rule laid down by our honorable friend, "that when the non-performance of an agreement or covenant, in its consequences, addresses to the forum of feeling, character, and standing, or future peace and happiness of the covenantee, the sum agreed upon must be considered as the rule of damages, or as liquidated damages," is doubtless entitled to credit for its originality, but not for its precision or soundness. It is wholly unsupported by authority. It is loose, indefinite, and incapable of being reduced to practice. What cases, we ask, would be adjudged to address themselves to 228] the *forum of feeling? Scarcely a single case can arise that does not affect, directly or indirectly, in its bearing or consequences, some one or more of the numerous feelings which agitate the bosoms of parties *litigant*. What cases shall be deemed to

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address themselves to the forum of character and standing. Perhaps a majority of cases address themselves, in one form or other, to that forum; but in attempting to discriminate those that do from those that do not, a judge would be obliged to exclaim, "*hic labor, hoc opus est.*" What cases shall be referred to the forum of future peace and happiness? It would puzzle a Jesuit to decide. The practical operation of the rule would make "confusion worse confounded," and render "darkness visible." Besides, the case does not come within the terms of the rule. The rule provides only for cases where the sum is agreed upon by the parties; a rule that would embrace a case like that of *Lowe v. Peters*, but not the present. In this case the damages are not agreed upon by the parties; but the performance of the contract is merely secured by a penalty. It is impossible for us to discover anything in the phraseology of the singular bond upon which the plaintiff has counted, manifesting an intention in the parties that the penalty should be considered as liquidated damages. It was, at most, a contract to marry. And if it be decided that the present is a case of liquidated damages, we can not perceive why the same rule can not apply to all bonds, securing the performance of covenants by penalties.

By the Court:

We are of opinion that the penalty of the bond, in this case, can not be regarded as liquidated damages, and that the instrument is not one upon which covenant can be maintained. The demurrers are therefore sustained.

*WILLIAM AND SAMUEL WATERS v. HUGH LEMMON. [229

On error to a decree in chancery, nothing examinable but bill, answer, exhibits made part of them, the decree, and matter made part of the case, by bill of exceptions.

Decree in equity, on complaint of a purchaser of land, rescinding the contract, and directing the purchase money to be refunded, and leaving the purchaser in unconditional possession of the land purchased, is erroneous.

THIS was a writ of error, brought to reverse a decree in chancery,

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pronounced against the plaintiffs in error, by the court of common pleas of the county of Brown, in a suit wherein the plaintiffs in error were respondents and the defendant in error complainant. It was adjourned here for decision from Brown county.

The material facts of the case were as follow: On January 15, 1816, the Waterses executed a penal bond to Lemmon, in the sum of three thousand dollars, conditioned that they should get a good and sufficient collector's deed for twenty acres of land, described in the bond, and specifying that the title was derived from a sale for taxes; or that they should make, or cause to be made, a quit-claim deed for the same. No time was fixed for procuring and making these deeds:

On January 18, 1816, Wm. Waters entered into another contract in writing, with Lemmon, specifying, that in consideration of two thousand dollars, paid one part in goods, and the residue in three annual payments from the date, W. Waters sold to Lemmon, forty acres of land, adjoining the twenty, and bound himself, when the last payment became due, to make Lemmon a general warranty deed, and to warrant and defend the same to said Lemmon. This article also contained a reference to certain personal property sold by Waters to Lemmon. Lemmon entered into possession, which he still retained.

The bill charged that the purchase was made with reference to a mill seat, which was on the twenty acres; that the whole purchase was made from William Waters, and the two thousand dollars, specified in the article as the purchase money of the forty acres, was the purchase money of the whole. It further states that Lemmon entered into possession, and erected on the twenty acres a grist mill, house, and stable, which cost him upward of seven thousand dollars; that no deed was procured for the twenty acres, and that after the improvements were made, he was informed that the title was worth nothing, and that W. Waters made a fraudulent representation as to the character of the sale for taxes, well knowing that the title was defective. The bill further stated that the lands sold for taxes had been redeemed by the heirs. It further stated that of the purchase money of two thousand dollars, about fourteen hundred dollars had been paid to said Waters, and that Waters had obtained a judgment, and levied an execution on Lemmon's property for the balance. An amended bill charges, that at the time of the purchase W. Waters produced a

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collector's deed, which was defective upon account of certain blanks, which Lemmon pointed out, and which W. Waters promised to have corrected. But that in consequence of a defect in the sale for taxes it could not be done. It is also charged in the original bill, that the whole quantity sold for taxes was seventy acres, of which the twenty is part, and that for the remaining fifty acres an ejectment had been brought against W. Waters, and a recovery had, he being unable to sustain the tax sale. The bill prayed that the contract for the sale of the twenty acres of land might be rescinded, and that Lemmon might receive compensation for his improvements, and other and general relief. This bill was filed December, 1823.

In his answer, W. Waters admits the sale, and that part payment was made, and judgment for the balance. He denied all fraud or misrepresentation. He denied that the twenty acres was the chief consideration for the two thousand dollars, and alleges that the whole sixty acres of land, considerable stock, mill stones, and valuable implements to a grist mill, and a saw mill, were sold in gross, for the gross sum of two thousand dollars. Alleges that everything was fairly represented, and all the papers exhibited at the time of the sale.

Much testimony was taken in the cause, and upon an interlocutory decree, it was referred to a master commissioner, upon whose report, a final decree was made in the common pleas, canceling the contract for the twenty acres of land, enjoining the recovery of the judgment at law, and decreeing that W. Waters pay to Lemmon one thousand three hundred and seventy-two dollars, fifty-two cents, and costs. This decree was pronounced at April term, 1828, and upon petition the Waterses obtained a rehearing.

At August term, 1828, the Waterses excepted to the master's report, and the cause was again heard, and a decree *pro- [231] nounced, corresponding with the previous decree, except that Wm. Waters was decreed to pay to Lemmon one thousand three hundred and eighty-four dollars and twenty-two cents. No disposition was made, by the decree, of the possession of the sixty acres of land, which was left with Lemmon. To reverse this decree the writ of error was brought.

M. MARSHALL, for plaintiff in error.

Lessee of Symmes and Stanbery v. Beaver.

H. BRUSH, for defendant.

By the COURT:

Upon a writ of error, to a decree in chancery, nothing is examinable, but the bill, answer, and exhibits made part of them, the decree itself, and such matter as may be made part of the case, by a bill of exceptions. The court do not rehear the cause upon its merits. This case must, therefore, be decided upon the allegations of the parties, and upon the decree. From these it appears that Lemmon, the complainant below, purchased from the Waterses sixty acres of land, with some personal property, and was put in possession of the whole. These purchases were made at different times. The first for twenty acres, the latter for forty acres of land, the two tracts lying contiguous and adjoining. Lemmon remained in undisturbed possession of the whole of both tracts, and of the improvements made upon them. His bill contains no offer to surrender all, or any part to the Waterses, from whom he received it; but prays that the contract may be rescinded, and the purchase money paid by him refunded. The decree conforms to this prayer. It directs the contract, so far as it relates to the twenty acres, to be rescinded; and it restores to Lemmon the purchase money, leaving him also the possession of the land. This we deem inequitable, and therefore erroneous. For this cause, the decree must be reversed, and the cause remanded for further proceedings. As the cause may possibly come before us again, upon its whole merits, as presented by the proofs, it has not been considered necessary to make up, or express an opinion, except upon this single point.

Decree reversed.

232] *LESSEE OF SYMMES AND STANBERY V. BEAVER.

THIS cause was adjourned from the county of Licking. It was submitted to the court upon the facts, involving a question of fraud, in the original conveyance to the lessor, Symmes. The court were of opinion that the fraud was fully established by the proof, and gave judgment for the defendant. It was deemed unnecessary to report the mass of testimony necessary to an understanding of the case. Without this the report could be worth nothing.

Parker v. Dunn et al.

JOSIAH C. PARKER v. WALTER DUNN AND OTHERS.

Notoriety of entry.

Claim to lands, between Little Miami and Scioto rivers, under Virginia resolution warrants, good.

THIS cause was adjourned here for decision from the county of Brown. It was a bill in chancery by the junior patentee of the elder entry, seeking a conveyance from the elder patentee. The case is stated in the opinion of the court.

M. MARSHALL, for complainant.

THOMPSON and SCOTT, for defendants.

By the COURT:

The bill states that, in July, 1799, Josiah Parker, being the owner of a land warrant, issued by the Commonwealth of Virginia for revolutionary services, caused an entry of the same to be made between the Little Miami and Scioto rivers. The entry is as follows: "January 29, 1799. No. 3,549. Josiah Parker enters four hundred and fifty acres of land on part of a military warrant, No. 1,920, on White Oak creek, about four or five miles from the mouth, beginning at the southwest corner of Curry's, and northwest corner to Heath; *thence N. 45, W. 370 poles, crossing [233 White Oak to a sycamore and hackberry marked with painted letters; thence S. 45, W. 370, to an ash and hackberry; thence S. 12, W. 30 poles to a stake; thence eastwardly to the beginning." The bill further states, that Josiah Parker was the grandfather of the complainant, and that he died leaving a will, devising to complainant all his estate, including the tract in controversy, upon condition that his devisee should assume the name of Parker, which he has done.

John Graham has made an entry covering the same land, and has the elder patent. The prayer is, that the defendant may set out his title and convey to the complainant his right, etc.

Walter Dunn, the trustee of the said John Graham, and the defendants, who claim under him, say, in their answers, that the warrant of the complainant was issued by a resolution of the

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Commonwealth of Virginia, and was therefore, by law, void as respects the complainant's right to locate the lands in the Virginia military tract. One of the complainants also insists upon the statute of limitations, etc. By the agreement of parties it is admitted that the complainant was a minor, residing in the State of Virginia, where he continued to reside until some time in the year 1824, and also that Josiah Parker was a resident of the same state, and never was in Ohio. Upon well-settled principles, the statute of limitations does not apply.

The case furnishes the most abundant proof of the notoriety of the entries of Heath and Curry for more than thirty years. As the facts furnish no deviation from the settled principles applicable to notoriety, it is unnecessary to detail them as exhibited in evidence.

It is urged this entry is vague in its calls for Curry's and Heath's, as those entries are not identified by quantities or numbers; but those entries are well defined, not only by fixed but by artificial monuments, and there is an entire absence of proof that there are any other claims, in the name of Curry or Heath, on White Oak run. A subsequent locator could not, therefore, be misled or confused for the want of a more exact and precise description of these entries.

The other point made in this cause was considered and decided 234] in the case of *Parker v. Wallace*, 3 Ohio, 490. *Upon a review of the principles of the last-mentioned case the court is entirely satisfied with the decision. It may be added, that the holders of resolution warrants have repeatedly been recognized by Congress as equally entitled to bounty lands within the Virginia military reservation with others having certificates, and particularly by the acts of March 3, 1807, April 11, 1818, and March 1, 1823. This, however, was a vested right in the holder when the cession was made to the general government. In the reservation no distinction is made between those entitled to bounty by resolution or otherwise, nor is it competent to institute an inquiry upon what evidence the warrant was issued.

The court is, therefore, clearly of opinion the complainant is entitled to the relief sought.

ROBERT WALLACE v. OHIO INSURANCE COMPANY.

The rule of one-third new for old, in the law of the marine insurance, is applicable to insurance of steamboats on the western waters.

THIS was an action on a policy of insurance, taken by the defendants upon the steamboat Hercules, for the sum of eight thousand dollars. Cincinnati was the home of the Hercules and of the plaintiff. She was run against by the B. Franklin and injured, but was nevertheless brought to Cincinnati and there repaired. The whole amount of charges claimed by the plaintiff for repairs was eleven hundred and thirty-six dollars. Of this sum six hundred and forty-seven dollars was admitted to be for repairs properly chargeable as such. The residue of the charges were for kitchen and table furniture, and for wages to captain, mate, steward, cook, and clerk. By the terms of the policy the insurers were not to be charged unless the loss amounted to ten per cent. upon the amount insured. The insurers refused to pay, because they contended that the loss, when reduced, according to the marine law, one-third, upon the doctrine of new for old, did not amount to eight hundred dollars, and because the items charged above the sum of six hundred and forty-seven dollars were not legally chargeable against the insurers. The action was [235 an amicable one, and the facts were all agreed, reducing the case to the points here stated, and agreeing also that the boat was not improved by the repairs. It was adjourned here for decision from the county of Hamilton.

CASWELL and STARR, for plaintiff:

The agreed case contains an admission of all the facts set forth in the declaration, so far as they are necessary for the adjudication of the merits of this cause. Only one allegation of the declaration is denied, and that is rather a conclusion drawn from the premises stated than the direct averment of a fact. The statement is, that the loss for which the insured claims indemnity exceeds ten per cent. upon the value of the property insured. Upon the correctness of this statement the cause of the plaintiff is supposed to rest. The value of the subject insured, as noted in the margin of the policy, is eight thousand dollars; unless, therefore, the loss amounts

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to eight hundred dollars the insurers are not liable, by the terms of the policy as set forth in the declaration. According to the agreed case the plaintiff is to have judgment for the amount of the bill of particulars, provided the loss, when adjusted by the court, amounts to ten per cent., not upon the amount insured, but on the value of the subject insured. Small as is the amount in controversy in this suit, the principles to be settled are of vast importance to the commercial interests of the western country.

We are authorized by gentlemen of the highest standing, and having access to the highest sources of information, to say that the annual marine risks taken in the city of Cincinnati alone exceed three millions of dollars! And yet this is the first instance in which the judicial tribunals of the state have been called upon to give a construction to a policy of insurance or adjust a loss. This, therefore, being a case of the first impression is important, inasmuch as the questions decided will serve as precedents in other cases, which may arise upon similar policies.

In order to arrive at a just conclusion in this case it will be necessary to discuss several questions:

1. How far shall the adjudication of foreign courts, and those of our sister states, be adopted as the rule of decision here.

236] *2. Whether the expenses of the master, pilots, clerk, mate, steward, cook, and one deck-hand, while the boat was repairing, shall be allowed.

3. Whether a deduction is to be made upon the bill of repairs, one-third new for old.

4. If such deduction is to be made, shall it extend to the whole bill of repairs, or to the furniture only?

If the wages of the master and crew are not allowed, as an item, upon which an adjustment of a partial loss is to be predicated, and a deduction of one-third new for old is made upon the bill of repairs, the loss thus adjusted falls within the ten per cent. But if we are allowed the wages and expenses of the crew, and no deduction is made except upon the furniture, or if the item of wages is rejected, and no deduction is made upon the residue of the bill of particulars, in either of the latter cases the loss will exceed ten per cent., and the plaintiff is entitled to judgment.

In addition to the usual allegations and proof in cases upon policies of insurance, the declaration in this case contains several special averments, supposed by us to be peculiarly applicable to

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policies upon steamboats navigating the western waters, all of which averments are admitted to be true, though their importance in the case will be denied.

It is admitted that the loss was occasioned by one of the perils insured against, that the injury done to the boat was of a permanent character, and that no repairs can render her of the same value as before the perils were incurred; that the expenditure on the part of the plaintiff, in order to enable him to put his boat in a running condition was necessary, reasonable, and proper; and further, that the insured could not safely discharge the crew; that to have done so would have jeopardized the profits of the residue of the running season of the boat (for which she was insured), and might have thrown her out of employ. Upon these admissions the plaintiff is entitled to recover, unless some unbending rule of law is interposed to bar that right.

On the part of the defendant it will be contended that, by the marine law one-third is to be deducted, "new for old," and that the expenses of the crew while the boat was repairing can not be allowed, inasmuch as the boat arrived at Cincinnati, where she belonged, where the repairs were made, and from whence she [237] commenced running her regular trips; and that the entire body of the law of marine insurance is to be adopted as the rule of decision in this court, without regard to our situation, or the peculiar navigation it is intended to protect.

We are willing that the roots of this exotic shall strike deep in our soil; but we ask the court to prune its shoots, as they spring up, to suit our necessities. We are willing to engraft its healthiest scions upon a vigorous native tree, but we can not safely lash our boat to its antiquated trunk. We contend that insurance upon steamboats forms a new era in the history of the commercial world, and that the ancient rules of decision, with reference to a different subject, can not safely be adopted in detail. Many of them are arbitrary, and not applicable to the state of trade, or the customs of navigating interests in the western states. The subjects of insurance, and the course of trade, are so widely different in their nature from those in which the rules were established, that it will be impossible to make anything like a universal application of them. We have insurance upon flat-boats, keel-boats, and upon steamboats. These differ as widely from each other as the navigation of tide-waters by ships differs from that of a steam-

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boat, steering her course among the sand-bars, the drift, snags, and sawyers of the Mississippi, and stemming the rapid and ever-changing currents of the innumerable bayous, which serve as outlets to this father of rivers.

What have the technical and arbitrary rules of marine insurance to do with such a navigation as this? That certain great and leading principles of insurance are applicable alike throughout the commercial world, and that many others may, in some degree, be made applicable to the navigation of the western waters, we readily admit; but we say they can not be adopted without many qualifications. Some of these rules were established without much reason, and for the mere purpose of having a rule. They have been applied to other cases for the sake of uniformity. So far, therefore, as they are consistent with the principles of equity, and can be made applicable to the peculiar nature of our trade, they should be adhered to, and no further.

238] *There is one principle which we think is universal in its application to all policies of insurance, and that is "that the contract for insurance is substantially a contract for indemnity." 3 Kent's Com. 203; Philips on Insurance, 1; 1 Marshall on Insurance, 1; Parke on Insurance, 2; Lex Mercatoria Americana, 254; 2 Blackstone Com. 458.

An adhesion to this fundamental doctrine will secure to the plaintiff a judgment to the full extent of his loss, unless he has forfeited that claim by some act of his own or of those in his employ. The agreed case shows that no blame was attached to the insured, who, in this case, was the master, or to the crew, but, on the contrary, it appears that they labored within the terms of the policy, for the safety of the subject insured. The rule which has obtained, in the courts, of deducting one-third new for old, must be predicated upon the idea that when a ship has undergone repairs, the new part which has taken the place of the old, is better than the old by one-third, and consequently should be deducted; otherwise the insured might speculate upon his losses, at the expense of the insurer. This is in accordance with the rule for which we contend "that a policy of insurance is to be construed as a contract of indemnity." We presume that experience has shown, that, taking the average injuries to which ships are subject, they are of a character that, when those injuries are repaired, the ship is more valuable than when the perils were incurred. For, in the

English courts, no deductions are made, if a partial loss is sustained by a ship on the first voyage, because no presumption can arise, that a new ship is benefited by repairs. And, even in the United States, no deduction is made for a new anchor, the reason of which is obvious, that a new anchor is no better than an old one. If this rule of deduction is traced to its source, we think it will be found that it was originally applied to the sails and rigging of a ship, and to them only. Subsequently it has been applied to the entire repairs. We contend, as a general rule, that when a steamboat, navigating the western waters, sustains an injury from external violence, she can not be made as valuable as before those perils were incurred. In the present case, it is admitted that the injury was of a character permanently to affect the value of the boat.

*If this policy, therefore, is to be construed as a contract of [239] indemnity, we are entitled to the expenses of repairs without deduction, for it is conceded by our opponents that no more money was expended than was absolutely necessary for the repairs of the boat, to put her in a running condition. We think, therefore, that the rule which has been adopted in the courts of the United States and in foreign courts, of deducting one-third without regard to the nature of the injury, is not calculated to do justice, and that this court ought not to adopt it.

We think it also clear that we are entitled to be paid the wages and expenses of the crew of the boat while she was repairing. It is a well-settled principle of the marine law that when a ship is compelled, from distress, to put into a port to repair, in order to enable her to prosecute her voyage, the insured is entitled to recover the expenses of wages and provisions while repairing; but it will be contended that because the boat in this case arrived at Cincinnati, where she belonged, and which is a usual place of discharging freight and passengers, they are not liable. We presume the case of *Dunham and Bool v. Com. Ins. Co. of N. Y.*, reported in 11 Johnson, 315, will be relied upon as well to sustain this proposition as the one already discussed. In that case, the ship *Orbit* was insured at and from New York to Liverpool, and at and from thence to the port of discharge in the United States. During the voyage she met with very severe gales of wind and heavy seas, which occasioned considerable damage. She eventually arrived at Liverpool, discharged her freight, and went into dry dock to repair. The judge in that case refused to allow the

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expenses of the captain and crew while the ship was repairing, and principally upon the ground that the ship arrived at her port of discharge, delivered her cargo, and thereby earned her freight.

The judge in this case is made to say that unless these expenses of repairs can be brought into general average, the underwriters on the ship can not in any case be made liable. To the correctness of this doctrine we can not subscribe, but the circumstances of the two cases are so different that we need not combat it. It is conceded by the judge that in the case of *Walden v. Leroy*, 2 240] *Caine*, 263, that the expenses *incurred for wages and provisions during the detention of a vessel for repairs was a proper subject of general average, and that the insurers upon the ship were liable. Suppose it were conceded that unless the expenses of wages and provisions were items of general average, in cases of insurance, for a particular voyage, the insurers would not be liable, yet the rule could not be safely applied here. The insurance upon the steamboat *Hercules* was not an insurance for a particular voyage, but for the term of six months. Any injury, therefore, which is within the terms of the policy, and which shall compel her to put into a port for repairs during the time for which she is insured, must be likened to a case when a ship, on a particular voyage, is compelled, from distress, to put into a port for a similar purpose, in order to enable her to prosecute her voyage. If a ship, during the voyage, or a steamboat, during the season for which she is insured, is compelled to put into a port for repairs, the insurers are liable to pay the expenses during the time necessary to make those repairs. It is important to the owners of steamboats that they should be able to run during the entire season for which they are insured, or that a ship should be able to prosecute her voyage and earn her freight. The principle of general average can not be made to apply to a case like that of the *Hercules*, even if the doctrine of Justice Thompson be correct. See also the case of *Paddleford v. Boardman*, 4 Mass. 432; *Power v. Whitmore*, 4 Maule & Selwyn, 141; *Plummer v. Wildman*, 3 Maule & Selwyn; 3 Kent's Com. 188, 250.

We might also urge the necessity of retaining the crew on board for the safety of the boat. Suppose the entire crew had been discharged, a rise in the river, the boat driven from her moorings, and a loss had been sustained, would the insurers have been liable

on their policy for such loss? We think it a condition annexed to all policies of insurance upon ships and steamboats that they shall be well manned and found, or the insurers are not liable for any loss which may happen.

According to the view we have taken of the case, the plaintiff is entitled to judgment for the entire bill of repairs of the Hercules, and the expenses of the crew while she was repairing. Whether a deduction should be made upon the bill of furniture, is respectfully submitted to the court without argument.

*HAMMOND & GARRARD, for defendants:

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Two points are raised for consideration in this case:

1. Is the doctrine of one-third new for old repairs, applicable to repairs on steamboats?

2. Where the repairs are made at the home of the boat, can a charge be made against the insurer for wages and provisions?

The marine law establishes both these propositions in favor of the insurer. But it is contended that neither ought to be applied to insurance on steamboats. The argument of the plaintiff's counsel does not seem to us satisfactory. The reason for the rule, new for old, is explained in all the elementary books. It does not proceed upon the ground of actual advantage in the particular case. But upon the ground that if, in every case, the actual damage should be inquired into, controversy would be endless. 3 Mason, 73.

If the boat be not injured half her value, she can not be abandoned, but must be repaired at the charge of the insurer. If a steamboat is ever worth repairing, there must be cases in which, when repaired, her value is increased. If this be conceded, there is an end of the argument. The reason is as strong for establishing the rule in regard to steamboats as to ships at sea.

The reason of the rule, respecting wages and provisions, is also applicable to the repairs of steamboats. It is not varied by the fact that that insurance is taken for a period of time certain. When the repairs are made at home, there is no voyage on hand; no freight to earn, no cargo to preserve. And it is because, when repairs are made on a voyage, when all these require attention, that the expenses are allowed.

The value, furnishing the rule for abandonment, for injury, is the worth of the vessel when the accident occurred. 3 Mason, 71.

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72. A steamboat very old and worn is worth repair. The damage is less than half her value. She is injured near her home, and is brought there for repair. Repairing does not make her as good as new, but more valuable than before the injury. The plaintiffs claim that she shall be thus improved at the charge of the insurer, and that a mate, steward, cook, captain, clerk, pilot, 242] and deck hands, *shall be maintained at the insurer's expense during the repairs. The argument would as well cover firemen and engineers, for when repaired and ready for navigation the boat can not move without them. We think it untenable.

By the Court:

In its practical application, the whole doctrine of insurance is new to us. We can not, therefore, undertake to settle principles so as to conclude us, should further litigations arise, and further investigations diffuse new lights upon the subject.

The question now necessary to decide is, whether an established doctrine of the law of maritime insurance shall be applied to the case of insurance upon steamboats navigating our interior rivers. The plaintiff contends that it is wholly inapplicable, and should, for that reason, be rejected.

It is admitted that if a sea vessel be injured to an extent less than one-half her value, she shall be repaired at the expense of the insurer. But in that case, one-third of the charges of repair shall be borne by the owners. The reason upon which the rule seems to be founded is, that the repairs place the vessel in a better condition than when she was insured. In this case, it is agreed that the vessel was not improved by the repairs, and the drift of the plaintiff's argument appears to be that when the reason for the rule ceases, its obligation is at an end. We understand that the rule is of universal application, and that it is not one adapted to each particular case. It is so laid down by Judge Story, in *Peel and others v. Merchants' Insurance Co.*, 3 Mason, 73.

"The rule itself is somewhat arbitrary, and not founded upon an exact calculation with reference to the particular case. The ship may be almost entirely new, and then the reason for the deduction would altogether cease. The ship may be very old, and the reason for a much greater allowance would apply. The general principle upon which the rule is founded is, as stated by Magens, that the underwriters ought to pay for the actual damage or

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injury, but not for the wear of the things lost or injured; and, therefore, proper allowance ought to be made for the difference in value between the new and the old. But if this difference were to be ascertained in every particular case by actual inspection [243] and estimates, there would be no end to controversies, and, therefore, general usage, which the law follows, as founded on general convenience, has applied a certain rule to all cases, not upon the notion of perfect justice, but as generally reaching, in substantial equity, the mass of them.

The doctrine, as here asserted, makes it wholly immaterial whether, in the case before us, the steamboat was actually improved or not by the repairs. So we must declare that the principle, new for old, is applicable to steamboats, or else that fact in the case can have no weight in deciding our judgment.

We are not prepared to say, that, in general cases, steamboats, when not injured more than half their value, at the time of injury, may not be greatly improved by repairs. That is, improved from the actual condition when the injury was sustained. We think this may be the case, and if so, we are not now willing to declare that this branch of the law of marine insurance should not extend to steamboat insurances.

If we understand the counsel for the plaintiff rightly, they propose that we shall take upon ourselves to revise the whole doctrine of marine insurance, and retain part as properly applicable to the case of steamboats, and reject part as wholly inapplicable. We think this work, if necessary to be performed, should be undertaken where there is more experience and knowledge on the whole subject. Steamboats commenced running in the waters of New York before they did in the western waters. The city of New York is the great commercial emporium of the Union. Her jurists, both bench and bar, are eminent for their deep and sound learning. Questions of insurance must have arisen, yet neither in the books of reports, nor in the excellent elementary treatise of Chancellor Kent, have we any intimation that the general doctrines of the law of marine insurances are inapplicable to steamboat insurance. Steamboats have been in use in England for years. We have no information that the principle now pressed upon us has been urged there. Under these circumstances we hold it safest to adhere to the doctrine as we find it settled, and administer it as an entire system, to those who claim at our hands the administration of a

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244] part of it. When the amount of one-third is deducted *from the whole charge for repairs, the loss is reduced to a less sum than eight hundred dollars. This not being ten per cent. upon the actual value, the terms of the policy do not entitle the plaintiff to recover. The whole case is thus disposed of, and it is unnecessary for us to say anything upon the other points presented in it. Judgment for defendants.

 LUDLOW'S HEIRS v. KIDD'S EXECUTORS AND OTHERS.

Where the legal title is fraudulently obtained, against a better equity, and conveyed to an innocent purchaser, without notice, complainants prevailing in equity may have a decree for the value against him who obtained such legal title by fraud.

THIS cause was adjourned here for final decision, from the county of Hamilton. It is the same cause reported in 2 Ohio, 372, and 3 Ohio, 541, and now comes up for final decision upon the merits of the original equity of the complainants. The facts are briefly these: In the month of January, 1789, the town of Cincinnati was laid out by Matthias Denman, Robert Patterson, and Israel Ludlow. Afterward, Denman and Patterson sold out to Joel Williams and Samuel Freeman. John Cleves Symmes was the original grantee of the government for a large tract of land between the Great and Little Miami rivers, the patent having been issued to him, in trust for himself and his associates, in the month of September, 1794. The proprietors of the town of Cincinnati agreed that the title should remain with Symmes, who should make deeds for the lots to the purchasers, upon the certificate of any two of the proprietors. At the original laying out of the town, the proprietors each selected a lot for themselves, which was not put into market. The complainants claimed that the lot in controversy was selected by their ancestor, who took possession, cleared off the timber, and inclosed it with a fence, and cultivated it.

John Kidd, under whom the defendants claim, in the month of July, 1799, rented the lot of Ludlow, and took a written lease for the term of eight years, and entered into possession under that lease, as Ludlow's tenant. In August, 1799, J. C. Symmes con-

veyed the lot to his nephew, Celadon *Symmes, without any [245 certificate from the proprietors directing such conveyance. In 1804, Ludlow deceased. Celadon Symmes conveyed the lot to Joel Williams, who was then the owner of Freeman's interest in the town property. And before the expiration of Ludlow's lease, Williams conveyed it to Kidd, who, at the expiration of his lease, retained possession upon his deed. The bill was originally brought against Williams and Kidd, to obtain from them the legal title, and in 1817, was dismissed upon a final hearing.

After this dismissal, Kidd sold part of the property, in fee, and leased a part of it for ninety-nine years, renewable forever, reserving an annual rent. Afterward, Kidd made his will, and directed that his executors expend the rent reserved for the education of poor children. For a time the executors received and so applied the rents, and at length transferred their interest and trust to the Cincinnati College. The Bank of the United States became the owners of the lease, and, in this condition of things, the bill of review was filed. Upon the service of the process on the bill of review the bank ceased to pay the rents. The court, having on the bill of review, reversed the decree of dismissal, the purchasers under Kidd put in the plea that they were innocent purchasers, without notice, and this plea was ruled in their favor. The rents reserved upon Kidd's lease, and the value of the lot, as against Kidd's estate, were all that was left for the complainants to obtain by a final decree in their favor.

This cause now came before the court, upon questions of fact and law, involving the superior equity, as between the heirs of Ludlow, claiming under him, and the representatives of Kidd claiming under Symmes. The court decided the facts to be in favor of the complainants, but considered it of no utility to report the evidence, so as to make the grounds of decision intelligible. The following decree was rendered in the cause:

"This day came the parties by their counsel, and the bill, answer, and exhibits being read, and understood, and the arguments of counsel thereon heard, the court are of opinion that the complainants are in equity well entitled, as against the devisees of John Kidd, to the possession and legal title to the lot numbered four hundred and one, in the bill mentioned; and it having heretofore been adjudged and *decreed in this cause, that the [246 whole of said lot, except the annual rents of one thousand dollars

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per annum, reserved by John Kidd, upon his lease to John Smith and David Loring, for ninety-nine years, renewable forever, dated August 18, 1818, of a part of said lot, had passed into the hands of innocent purchasers for a valuable consideration without notice, and, therefore, could not be affected by the equity of the complainants, the court can only extend relief to the complainants, as against the said John Kidd, and as against his devisees of the said rent reserved.

The court do, therefore, order, adjudge, and decree, that the Cincinnati College, by a proper deed of conveyance under their corporate seal, assign and transfer to the complainants all the right, title, and interest, they may have acquired in and to the lease from the said John Kidd, deceased, to David Loring and John Smith, and to the rents thereon reserved; and that the said Joshua L. Wilson and Oliver M. Spencer, executors and trustees of the said John Kidd, deceased, by a proper deed, in writing, release to the complainants all the right, title, and interest that may remain in them, to the lease aforesaid, and the rents thereon and thereby reserved, both said conveyances to be made and executed on or before February 1, 1830, and in failure thereof, then that this decree fully invest the said complainants with all the right, title and interest of the said Cincinnati College, and of the said Joshua L. Wilson and Oliver M. Spencer, as executors and trustees of the said John Kidd, deceased, in and to the said lease and rents thereon reserved; and, in respect to the annual rents of one thousand dollars per annum, reserved upon said lease, which have accrued since the emanation of the process in this case, upon the bill of review and supplemental bill, to wit: since April 1, 1825, the court are of opinion that the complainants are entitled to a decree for the same, and it appearing to the satisfaction of the court that the said rents remain in the hands of the defendants, the president, director, and company of the Bank of the United States, the court do award, order, and decree, that the president, directors and company of the Bank of the United States account for and pay over to the complainants the whole amount of one thousand dollars per annum of annual rents, which have accrued since April 1, 1825, until the pronouncing of this decree. And it *further appearing to the court, that, at the time of filing the original bill in this case, to wit: on March 15, 1821, the said lot was improved and yielding rents, the court are

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of opinion that the complainants, as against the estate of the said John Kidd, and his executors, representing that estate, are entitled to an account for, and payment of the rents and profits justly accruing on said lot, deducting therefrom all proper charges for taxes paid, and improvements made. It is therefore decreed, that Samuel F. Hunt be, and he is hereby appointed commissioner to take and state an account of all such rents and profits, from March 15, 1821, to the time of taking such account, crediting upon said account the annual sum of one thousand dollars, from April 1, 1825, already charged by this decree; said account to be taken upon equitable principles, and report thereof made to the next term of the Supreme Court in Hamilton county. The court are further of opinion, that the complainants, as against the estate of John Kidd, are entitled to the present value of the said lot of ground, number four hundred and one, in the bill mentioned, except for the portion thereof which produces the annual rent of one thousand dollars per annum. It is therefore ordered that the said commissioner estimate the present value of the said lot number four hundred and one, deducting therefrom such part as produces the annual rent aforesaid, and report the same to the Supreme Court of Hamilton county at their next term. As to the defendants, John Williams, Thomas Williams, Benjamin Williams, Joel Williams, and Eleanor Williams, the bill is dismissed. And the court do further award, order, and decree, that the complainants recover of the executors of John Kidd, deceased, to be levied upon his goods and chattels in their hands to be administered, their costs and charges in the prosecution of this suit expended; and it is ordered that the clerk of the Supreme Court for Franklin county send a certified copy of this decree to the clerk of the Supreme Court of Hamilton county, who is directed to enter the same on the journal of the court.

GARRARD, for complainant.

Fox, for defendant.

CASES

DECIDED BY THE

Supreme Court of Ohio,

BEFORE ALL THE JUDGES,

AT A SPECIAL SESSION HOLDEN AT COLUMBUS, JAN., 1831.

D. Z. AND D. C. COOPER *v.* MICAJAH T. WILLIAMS.

Court of equity can not control the canal commissioners, in using the quantity of water necessary for the navigation of the canal, upon the complaint of individuals claiming an interest in the water, nor in selling it for hydraulic purposes.

THIS was a suit in chancery to enjoin the defendant, one of the acting canal commissioners, from selling certain water privileges created by the location of the canal at Dayton, and was reserved from the county of Montgomery. The bill alleged that the ancestor of the complainants was the owner of a large real estate in and adjoining the town of Dayton; that this real estate was so situated as to give him the entire control of valuable water powers, by taking the water from Mad river, a mile or more above its mouth, and conducting it through his lands by races, and then discharging it into the Great Miami river, either *east* of and above the town, or south of and below the town of Dayton. That in

his lifetime he erected divers large and valuable mills, and in various modes appropriated and used these water privileges; and to prevent future collisions, he reserved to himself, his heirs, etc., the right of conducting water through most of the out-lots and lands sold by him, lying west of the road leading from Dayton to Waynesville, and south of the town of Dayton. That by his last will and testament he directed his executors to sell certain out-lots and lands for the payment of his debts, but reserving the same privilege of conducting water through them, and that the complainants, his children and residuary legatees, are entitled to said real estate, with all water privileges, etc. That in 1827 the board of canal commissioners located the *canal, a basin and feeder, at [254] Dayton. The canal was located on the east side of Dayton to Main Cross street; the basin from Main Cross street to First street, and the feeder was taken from Mad river, above the lands of the complainants, and upon the lands of James Findlay, and after passing southwardly and mostly through the lands of the complainants, discharged itself into the main canal a short distance below the saw-mill erected by the ancestor of the complainants. The canal, basin, and feeder were completed in 1829, agreeably to this location, and the bill avers that the feeder conveys an ample supply of water to the main canal for the purposes of navigation.

The bill further alleges, that at the time the canal, basin, and feeder were located, the canal commissioners agreed that a cut should be made from the head race of complainants' saw-mill to the basin, at or near its head, and the water thus turned might be used by the complainants for the purpose of propelling machinery; that this arrangement has been carried into effect on the part of the complainants, and the cut made and privilege leased to one Richards, who is erecting a valuable cotton factory upon the cut. It is also charged, that an agreement was made with the canal commissioners to raise the complainants' saw-mill wheel, to save the expense of a culvert, which has also been complied with by the complainants.

It is further alleged, that the complainants, without materially injuring their water privileges, can furnish a constant and ample supply of water for the canal, and that the commissioners by their dam across Mad river can always control a sufficient quantity of water by the feeder as located and finished. The complainants

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also charge, that the defendant, in conjunction with others, and for private speculation, caused a new feeder and basin to be excavated; and that the defendant is about to divert the water from the old feeder to create a water power, and to sell the same for the benefit of the state, to the great detriment of the complainants. It is also alleged, that a much greater quantity of water is taken from Mad river, by the feeder, than is necessary to supply the canal, and thereby the property and water-works of the complainants are essentially injured.

255] *The bill prays for an injunction to prohibit the diversion of water from the old feeder, and the sale of a water power which would be created by such diversion; and also to prevent more water, than is necessary to supply the canal, from being taken into the feeder.

The defendant, in his answer, admits the location of the canal, basin, and feeder at Dayton, as set forth in the bill, and that the dam across Mad river will amply supply the canal through the feeder. He denies that any contract was ever made by him, or any other of the canal commissioners, that a cut should be made from the head race of the saw-mill to the basin; but says that at the time the basin was located, an objection was made by the guardians of the complainants and by others, that so large a body of water might endanger the health of the neighborhood, unless a current should be let into and pass through it; to this objection it was replied that such an evil might be avoided by making a cut and introducing a small wheel for light machinery. In this way, and to obviate said objection, and not to confer any peculiar benefit upon the complainants, the officers of the state permitted said cut to be made. Defendant admits that the complainants raised the saw-mill wheel twelve or eighteen inches, but denies that any agreement was entered into by which the state are bound to permit the water to pass through the mills into the canal, and alleges that the deposits of saw-dust, etc., in the canal, below the mill, have induced a belief that it may be necessary to abandon the present mode of admitting water from the mill. The defendant is unable to say whether the canal can be supplied by water from the mills or races of the complainants, but alleges that it has been determined by the proper officers under the law, that for obvious reasons it is not prudent to rely upon private individuals for a supply of water. He is also unable to say whether the com-

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plainants have been injured by withdrawing from Mad river the water necessary for the canal, but believes, with economy, the complainants would have sufficient water for their mills, etc., which were erected at the time of the commencement of this suit.

The defendant denies that he ever intended to change the location of the old feeder, or establish a new one, or that *he [256 ever authorized the excavation of a feeder to connect said basin with the canal, or established another basin or race, but alleges that said basin and race are the works of individuals, and managed at their own will and discretion.

The defendant admits that he was about to sell, for the benefit of the state, about two thousand cubic feet per minute of the water passing through the feeder, to be used for hydraulic purposes, and to be returned into the canal through the basin, race, and side cut, made by said individuals, leaving one thousand or fifteen hundred cubic feet per minute to pass into the canal through the first feeder, and insists he has a right so to do under the law. The defendant further alleges that the state have purchased about one and a half acres of ground, at the point where it is proposed to take the water from the feeder, for hydraulic purposes. This purchase was made by order of the canal board, in the form prescribed by law, and for the purpose of using the water from the feeder for hydraulic purposes.

The defendant denies that he ever caused or ordered more water to be thrown into the canal through the feeder than was necessary for the purposes of navigation, nor did he ever propose to sell water to such an amount as would increase the quantity necessary to be drawn through the feeder from Mad river, nor would the sale of two thousand cubic feet per minute, at the point owned by the state, produce that effect.

To this answer the complainants replied generally.

The complainants took the depositions of eleven witnesses: Isaac Pioneer, James Clymer, David Reid, Wm. M. Smith, Elisha Brabham, Amos A. Richards, John Sharter, John W. Vancleve, Alex. Grimes, Samuel Farrer, and T. Clegg.

The defendant took the deposition of James H. Mitchell.

An abstract of this testimony, so far as is deemed material, is here made, and arranged to the different points presented in the cause.

First. The works erected by the complainants, before the location of the canal was absolutely fixed.

Brabham testified there was a merchant mill, with three runs of stones, a waste wheel to drive from two to four grindstones, a 257] fulling-mill, with two water wheels, driving two sets of fulling hammers, a carding machine, with one water wheel, driving two carding machines and one wool picker. A cotton factory, number of spindles not known, and a saw-mill with two saws.

There was no controversy but that the works here enumerated, were owned and kept in operation, by the complainants, before the canal was finally located.

Second. The works erected after the canal was located, and before the sale of water power was proposed.

Amos A. Richards testified, that he had erected a cotton factory, on a cut from the head race of complainants to the basin. That he had taken a lease for the water from complainants. That before he took it, complainants sent him to J. Farrer, principal engineer, to obtain permission to make the cut. That he went to Farrer, explained the object, and the quantity of water required; that Farrer assented; the race, or cut, was dug by a person whom Farrer recommended, and that Farrer was present while the cut was digging, and approved of it.

The testimony of this witness was unimpeached.

J. Farrer testified the wheels were raised by complainants, at their own expense, for the accommodation of the canal commissioners, and at a loss of a considerable portion of their water power.

Third. The injury sustained by complainants, by the abstraction of the water of Mad river into the canal feeder.

Upon his first examination, Brabham testified that he had kept the complainants' merchant mills for eight or nine years. That during the last year there was a deficiency of water, for about four months, in the latter part of summer and beginning of autumn. That a part of the time all the water of Mad river was turned into the feeder, and the mills supplied by a waste way from the feeder, but all that could be spared from the canal was insufficient. In his latter deposition, he states that after August 1, 1830, the saw-mill stopped from a deficiency of water—the fulling-mill was also stopped, and the merchant mill stopped after the 6th of August, except on nights and Sundays.

Shartle testified that he had attended the saw-mill, for several years, and that in 1829 the mill did not run for two *months. [258] In his second deposition, he stated that the saw-mill was stopped for want of water, that they had from a hundred and fifty to a hundred and sixty logs on hand; that if the saw-mill could go on it would be worth from ten to twelve dollars for every twenty-four hours, and that Mad river was not then lower than usual at that season of the year. He further stated, that before the opening of the canal there was no deficiency of water for all the works.

Fourth. With respect to the connection of the defendant with Seely's works, and the nature and character of the title to the land contracted for, by the state, where the sale of water power is proposed.

John W. Vancleve testified to the general correctness of the map produced. He also stated that the ground purchased by the canal commissioners was sold by H. Phillips to Seely, and by Seely to the state that Barr and Lodwick held Phillips' bond to Seely, and were prosecuting a suit against Phillips for the title.

Samuel Farrer testified that he had examined Seely's works, at the request of the defendant, after the proposition to sell to the state was made. He stated, also, that defendant informed him his brother was once concerned in a purchase of land connected with Seely's works; but that when he ascertained that Mr. Seely intended to sell the land to the state for water power, his brother, at his urgent request, relinquished his interest.

There was much testimony as to the waste of water, the opinion of witnesses concerning the relative injury and benefit of the canal to the complainants' property, at Dayton, and with respect to the admeasurement of the water, its waste by absorption, and the effect of the sale of the proposed quantity of water, upon the water-works of the complainants, and upon their general interest. There was testimony, also, as to the capacity of the complainants' mill-race and other works to supply the canal with water, and the propriety of the state relying upon such supply.

James H. Mitchell was the only witness examined by the defendant. His testimony applied to different views of the case. He stated distinctly, that should the water of Mad river be as low as in 1829, and the state take three thousand *cubic [259] feet per minute for the canal, Cooper's mills must stop. He also

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stated that no advantage would probably result to the state, by supplying, from the feeder, water for Seely's canal and basin, but the revenue from the sale of the water power. He stated, in addition to this, that the water power from the feeder could be as advantageously used on the complainants' lands as at the point it was proposed to sell it. The witness was the superintendent of the canal at Dayton.

HAMMOND, for complainant:

Upon this state of facts, two questions are presented for consideration.

1. The rights of the complainants, as against other individual citizens.
2. The rights of the state, under existing laws, and the tendency of the proposed measure to injure the complainants.

First. The water of the feeder to supply the canal, being taken out of Mad river, upon the lands of Findlay, lying immediately above those of the complainants, the first question is settled by deciding the relative rights of Findlay and the complainants. The doctrine upon this point is briefly but very distinctly laid down in 3 Kent's Commentaries, 353-359. One result is, that the proprietor above can use the water while it runs over his own land. But he can not unreasonably detain it or divert its course. He must return it to its ordinary channel when it leaves his estate.

Another result is, that the first appropriator of the water may, in consequence of such appropriation, and the enjoyment of it for a length of time, acquire absolute rights against an adjacent proprietor. An uninterrupted enjoyment of the use for twenty years is held to extinguish an adverse claim, and to secure a perfect continued enjoyment to the first appropriator.

According to this doctrine, the right of the complainants to the use of the water, as against Findlay, was this: Findlay might use the water on his own land, but could not divert its entire course. He was bound to return it to its natural channel when it passed 260] through his estate. And this he was *bound to do without reference to the quantity required by the complainants for their then use. Their right existed, complete, to the use of the whole body of water that remained after the consumption for rightful use by Findlay; and that consumption must be upon his own land.

If an agreement had been made, by Findlay, with the proprietors of the lands below, which did not bound on the banks of the

river, to take the water from Mad river, and conduct it from Findlay's land to theirs, and through their lands into the river at a point below the lands of the complainants, it would be a wrong which the law would redress. Take the case before the court, and separate it from the operations of the canal commissioners, and it well serves to illustrate the true doctrine on this subject. Suppose an agreement between Findlay and Seely, to supply Seely's canal and basin, as constructed, with water taken from the river, on Findlay's land, and returned to the canal at the point proposed. Could this be rightfully done, even if water enough be left in the river to work all the establishments of the complainants now erected? It is very clear to me that it could not. And for this reason: the use of the whole volume of the water is the property of the owner of the bed and banks. And each owner, both above and below, must use it with a direct reference to this right of property in others. The arrangements made by the ancestor of the complainants, to secure and preserve the full value of this water property, shows plainly that he contemplated using it all. It was his right to do so, of which no proprietor could deprive him. It is considered unnecessary to say more in support of the absolute right of the complainants to the use of the whole volume of the water of Mad river as against Findlay, subject to his use of it, upon his own lands.

The second point to be considered is, the rights of the state, and the effect of the proposed measure upon the interests of the complainants.

The right of the government to assume a disposition of private property, for public use, rests upon the great principle, that the interest and welfare of the whole are paramount to the interest and welfare of an individual. This principle rests upon the doctrine of necessity, but it is agreed by all *publicists, [261 that the necessity must be for a public use, and that use of a public character. Lands may be assumed for public highways, for public canals, for the erection of a public armory, or public buildings, such as a state-house, court-house, or jail; for without the land such works and buildings could not be constructed. Private houses may be razed to arrest conflagration, and personal property seized to supply an army. But the public use must be direct and necessary to render the public appropriation lawful. Kent justly remarks, 2 Com. 276, "It must undoubtedly rest in the wis-

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dom of the legislature to determine when public uses require the assumption of private property, and if they should take it for a purpose not of a public nature, the law would be unconstitutional and void." The power to take it, even for a public use, is limited, by our constitution, to the case where compensation in money is made for it.

In enacting the laws for the construction of our canals, the legislature has acted with a scrupulous regard to these doctrines and principles. The first act was passed February 24, 1825, and section 9 authorizes the commissioners to take possession of the "*lands, waters, streams, and materials*" necessary for the prosecution of the work, and provision is made for ascertaining the individual injury and making compensation. This was predicated upon the position that the public necessity warranted the assumption of the use of individual property. Section 8 of this law authorized the commissioners to apply for and receive donations of land or other property in aid of the work. But no attempt is made to place the property thus acquired upon any other foundation than if held by individuals.

The next law passed on this subject is that of February 7, 1826. It is entitled, "*An act to provide for the increase of the canal fund by the purchase and sale of real estate.*" The very title of this law shows that the legislature did not proceed upon the hypothesis of assuming property as necessary for the public use. Section 1 authorizes the commissioners to procure, by purchase or otherwise, a suitable quantity of land at each point on the canal where the water might be profitably used for hydraulic purposes; and section 2 authorizes a sale of the lands or lots ceded to the state in 262] aid of the canals, excepting those purchased with a view to hydraulic purposes. It can not possibly be maintained that this law contemplated the acquisition by the state of any higher right than that possessed by the individual from whom they might obtain a grant. And this is placed beyond controversy, as we think, by the provision of the law directing the disposition of this hydraulic power. Section 5 of the act of February 16, 1828, directs that "whenever, in the opinion of the board of canal commissioners, any water may be spared from any state canal, or works connected therewith, without injury to the navigation or safety of such canal, the board may offer a sale of such surplus water for a term of years, in their discretion, to the person who

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shall bid the highest annual rent therefor: *Provided, THE SAME SHALL NOT IN ANY WISE INTERFERE WITH THE RIGHTS OF INDIVIDUALS.*" If the sale of water which the bill asks to have enjoined in *any way interferes with the rights* of the complainants, the law does not authorize, but in terms prohibits such sale.

We have seen that the proprietary right of the complainants to the water, as against other proprietors, is absolute for the whole. And we see that while the state assumes the use of the water for navigating the canal, in virtue of her right of government domain or sovereign power, upon the ground of public necessity, she does not attempt so to dispose of the water for hydraulic purposes. This latter she justly regards as an affair of individual contract, to be regulated by the same law that decides all other individual rights. She claims the public use of the water, but no proprietary right which may, in any way, interfere with the rights of individuals.

In this case, the ground purchased by the state for the use of the hydraulic power of the canal was purchased from Seely. While the ownership was in him, would it have been a legitimate use of the water for the state to have sold him a right to use it for hydraulic purposes, without regard to the interests and rights of the complainants? So to have proceeded would have been an abuse of the power to take for public use. Its operation would be to take the water of the complainants and to sell it to a third person. In its most *qualified character, it would be connecting a private with a public use—public gain with private speculation. If the state, in the case put, could not sell water power from the canal to the proprietors of lands into which the water was brought, without wrongfully employing the power to take for public use, assuredly no new right could be acquired by purchasing the land itself. When the state purchases land to use in a private trade and business for gain, she can acquire only the rights of her vender. All the legislation upon this subject shows that it was so understood by the legislature.

Let us again recur to the right of the complainants. It is absolute to the use of the whole water of Mad river upon their lands, through which it passes. The power of the state, rightfully exercised, extends no further than to assume the use of this water for navigating the canal. The laws upon the subject are scrupulously careful not to transcend the proper exercise of legislative

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powers. Section 8 of the act of 1825, already quoted, in giving authority to "enter upon, and take possession of, and use lands, water, streams, and materials," adds a proper caution to the commissioners in these words, "*doing, nevertheless, no unnecessary damage.*" In the spirit, and, indeed, according to the very letter of this admonition, it was the duty of the commissioners, in using the water of Mad river for the canal, so to use it as to do no damage to the complainants' rights, which necessity did not render inevitable. Thus when the water was brought, by the feeder, upon the lands where it had been previously used by complainants, and where they had a right to use it all, except what was necessary for the canal, if its situation was such that the complainants could use it, from the feeder, without prejudice to the public use, they might reasonably claim the use. To refuse it is doing them "*unnecessary damage;*" to sell the use to others is worse than "*unnecessary;*" it is wantonly inflicting an injury. At the point where this controversy arises, the water power is not created by the canal. It exists independent of that work, and is the property of the complainants. Their ancestor had been careful to preserve the right to use this power exclusively in himself. The complainants have pursued the same policy. In this they are but
264] making what they deem the best use of their own property; and it is their *right* to secure to themselves, if they can, the entire appreciation in value of all that is their own. Does it not "*interfere*" with this "*individual right*" of the complainants to take this control of the water power from them and dispose of it to others? That it does so interfere can not, I think, be disputed. On this single view of the effect of the sale it seems to me that the injunction ought to be made perpetual. The proof shows more serious and direct injuries. For two successive seasons the use of the water, for canal purposes, has occasioned a part of the works of the complainants to stop. And the proof also shows that, in the present season, a supply from the feeder has been refused to them. Such is the testimony given by Brabham in his last deposition. If, then, the state proceeds to sell water to a third person upon the opposite side of the feeder, it is clear that sending the water in that direction must prejudice the complainants greatly beyond the mere ordinary waste and evaporation. They can not then obtain a supply from the feeder, to which they are unquestionably entitled, when it can be had without injuring the naviga-

tion of the canal. That it can be so had, is the very proposition upon which the sale of the water must rest. It is only in that case that the law authorizes such a sale. And the engineer, Farrer, testifies that the water can be taken from the feeder west, so as to be used by complainants as safely as where it is intended to sell it.

The case presented to the court is a strong one to demonstrate the impolicy of connecting private trade, for gain, with public works. Here a large sum of money has been expended in excavating a basin and a canal, with a view to build up a town, and divert to it a portion of the business transacted upon the public canal. This is all the work of private speculation, and its success must depend upon obtaining water from the public feeder. The persons engaged in this work buy a lot of land, on the feeder and from them the state becomes the purchaser. This being arranged quietly, the excavations are commenced and continued, and so soon as it is convenient for the proprietors to receive water into their basin and canal, and not before, the commissioner advertises a sale of the water. One can not resist the suspicion that there was some understanding between the public agent [265 and the constructors of these works. It is improbable that they would have bought the lands and made the excavations without some well-grounded belief that the water power would be sold where it would best accommodate them. It is remarkable that the time appointed to sell happened to correspond most opportunely with their interests. It is worthy of note that the commissioner's brother should have been an original partner, and induced by the commissioner to sell out to save appearances. We may note, too, that while we learn the fact of selling out, the terms of that sale are not made known to us. And it is not the least remarkable circumstance that, so far as the commissioner is involved, there is some confliction between his answer and the testimony. These reflections only bear upon the cause as proving how much more this sale of water power partakes of private than public concern. In reality the adverse party in this case is a private company, whose views of gain are countenanced by the public agent. If permitted to succeed, the actual practical result must be a private speculation made at the expense of the complainants, which could not be effected without the instrumentality of a public agent. Justice and right, good principles, and sound policy,

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all unite in support of the complainants' prayer for a perpetual injunction.

MASON, for defendant:

The power claimed by the agents of the state, to take the water of Mad river, and appropriate it to the construction of a navigable canal, is derived from the constitution, which declares that "private property shall always be subservient to the public welfare, provided a compensation in money be made to the owner." This power, as claimed and exercised by the agents of the state, in the act of taking and appropriating the water to the public use, is very properly conceded by the pleadings. To attempt, therefore, to prove what is not denied, would be a useless consumption of time. The power of the state to take private property for public use being admitted, the questions that seem to be presented for decision are:

266] *1. Whether the state, having acquired a right to the use of the water of Mad river for a navigable canal, may lawfully dispose of any part of it, for a purpose subordinate to, and not inconsistent with the end for which the water was first appropriated.

2. If the state had not the power contended for, then, whether the complainants have shown such an *interest* in the subject matter in dispute, as entitles them to the relief they seek. And,

3. In case the complainants have shown themselves entitled to relief, to what extent ought the relief prayed for to be granted.

1. The legislature has granted power to the canal commissioners, and each of them, to enter upon, and take possession of any lands, waters, streams, and materials necessary for the prosecution of the improvements, intended by the act of February 4, 1825.

The validity of this grant of power is not contested on constitutional or other grounds.

What right, then, did the state acquire to the water taken and appropriated in execution of this power? This inquiry is essential to the determination of the first question.

By section 8 of the act just cited, it is enacted "that in case any lands, *waters*, streams, or materials *taken*, and *appropriated* as aforesaid shall not be given or granted to this state, then the canal commissioners shall, on application of the owners of such lands, *waters*, etc., appoint appraisers, who are required to take an oath,

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and to appraise the loss or damage, if any, of the owner of the *premises*, so required, for the purpose aforesaid; and the canal commissioners are directed to pay the damages so to be assessed and appraised; and the *fee simple* of the *premises so appropriated* shall be *vested* in this State.

Under the provisions of this statute, the state has acquired *possession* of its lands, waters, and materials taken and appropriated to the use of canals. And has, moreover, acquired not only the *right of possession*, but the *right of property* in the same. In which union consists a complete title to lands, tenements, and hereditaments. 2 Black. Com. 199. An estate in fee simple in the "*premises*," consisting of land, *water, and materials passes [267 to, and is vested in the state. The state acquired all the title that was vested in the owner of the land, water, etc., at the time of the appropriation to public uses; and its title is adverse to the former proprietor. It is true, "nothing but an usufructuary property is capable of being had in water (2 Black. Com. 14), yet that element is capable of being held in fee simple; and the right of the proprietor to the exclusive enjoyment of the use is protected by adequate remedies for its violation.

It is said, on the other side, that the state claims the public use of the water; but not the proprietary right, which may interfere with the rights of individuals. The rights of the state have been wholly misapprehended; and to this singular misapprehension, must be attributed most of the errors that abound in the argument of complainants' counsel. If the complainants had a proprietary or other right to the water in question, they have been divested of that right, whatever it may have been, and their title to the fullest extent which they could claim to enjoy it, has, under the operation of the constitution and laws of the state, been transferred to the State of Ohio.

The state, in virtue of its *eminent domain*, appropriates to itself lands, waters, and materials for the construction of a navigable communication between remote points, within its jurisdictional limits, and when so taken and appropriated, the state acquires, from the very reason of the thing, and the express provisions of law, an estate in fee in the property so taken.

Suppose the land, water, or materials to have been acquired by the gift or grant of the individual proprietors, could any intelligent person be found so hardy as to contend that the title of the

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state, acquired by such donation or grant, was not a "proprietary right," but an estate *at will or sufferance*? Is the title of the state, when obtained by the exercise of its sovereign power (which presupposes the consent of the owner, to be wanting), inferior to that vested in the state, by the other modes of acquisition? If this be constitutional law, then the power to take private property for public use was granted to no beneficial purpose. It is a mere de-268] lusion—nay, worse; for its exercise has drawn after *it, the expenditure of money, equivalent to the price of the thing taken; and hence, if the state, when it takes for the public use, and makes compensation to the owner, does not acquire, by that act, the absolute right to the property, it would have been better had the power never been granted.

The absolute right of the state, to hold in perpetuity, the *lands* of the complainants, taken for the construction of the feeder to the Miami canal, is nowhere controverted. Yet the complainants, on some principle, wholly unexplained, and to us incomprehensible, assert a right to the use of the *water* taken by the state, and appropriated to the same purpose with that of the land.

If the *land* and *materials* of the complainants, taken by the state, and appropriated to the public use, have, by that operation, and the payment of a consideration, become vested in fee in the State of Ohio, so has the water of the complainants, acquired in the same manner, and destined to the same public use, become vested in the state in fee simple.

If any distinction can be taken between the right of the state to water taken for public use, and that to land taken for the same purpose, it can be founded only on the difference existing in the nature of land and water. The largest estate in water that can be vested in an individual, is an usufructuary property. But this property carries with it, as an incident, the right to exclusive enjoyment within the boundaries of his land. Indeed, the right in others to control, disturb, or interfere with the enjoyment of his use, is excluded by the very definition of property. Would it not be an extraordinary proposition to advance, that the state, in the exercise of its sovereign power to take private property for public use, acquires thereto a title, exposed to greater insecurity than that of the individual from whom it had been taken.

The state takes, and appropriates water to construct a canal, and the right to do so is limited only by the obligation to make

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compensation to the owner. Can the state be controlled in the use of the water, by the laws that regulate it, by individuals, whose rights are confined, in this particular, to the bounds of their own lands? So far from it, that the right of the state to the use of water taken for canal navigation *may be lawfully exercised [269 throughout its territorial limits. As an individual, by purchase, or prior occupancy, may acquire a right to the exclusive use of water, on his own land, in a particular way, so may the state, in the exercise of its sovereign power, to take for public use, acquire the same right to the use of water, in every part of the territory over which it has dominion.

How the state acquired its title to the water in question nowhere appears. It is to be presumed, therefore, in the absence of any allegation, or proof to the contrary, that the acquisition was lawful. That the complainants gave or granted the water to the state; or *that* not having been done, they applied to the proper tribunal for compensation, and that damages were awarded, or not, according to the real merits of the case. In either event, the rights of the complainants were divested and transferred to the state.

It now remains to inquire, under the first head, whether the agent of the state has power to dispose of some portion of the water, for any purpose subordinate to, and not inconsistent with the design of its original acquisition.

In some sections of the country through which the canals have been located, the want of sufficient water power had been severely felt, and this deficiency was greatly aggravated during seasons of drouth. To obviate an evil that retarded the progress of population and improvement within the sphere of its influence, and to give to the work, projected by the state, a larger capacity for usefulness, by creating a water power that should be commensurate with the necessities of the public, was among the conspicuous benefits intended to be secured by the adoption of the canal policy. These benefits, in connection with the no less important considerations arising from the interest which the people of the state have in the sale of this water power, are of a character that forbids their being yielded up without a very distinct knowledge of the grounds on which their surrender is demanded. These benefits, which entered into the contemplation of the projectors of the canals, and contributed largely to recommend their policy to the

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approbation of the people and legislature of the state, must be thrown away, unless the water power, created by the construction 270] of the canals, can *be sold, or otherwise disposed of, according to the original intention of their projectors.

The legislature, not doubting its power over the subject, did, by section 5 of the act of February 16, 1828, direct the board of canal commissioners to sell, when in their opinion it might be done without injury to the navigation or safety of any state canal or works connected therewith, any surplus water for a term of years, to any person who would bid the highest annual rent therefor. The power to sell, delegated to the commissioners by this section, is derived from the absolute ownership of the thing directed to be sold. Its *extent* only, and not its *validity*, is questioned on the other side.

The supposed limitation of the power to sell is contained in the proviso to the section in these words, namely: "Provided, the same shall not in any wise interfere with the rights of individuals."

Treating of the proviso, the counsel for complainants says, if the sale of the water in any way *interferes with the rights of the complainants*, the law does not authorize, but in terms prohibits such sale. The whole argument of counsel proceeds on the hypothesis that the complainants still retain their original rights to the water taken from them by the state, and may interfere to regulate or control its disposition.

To uphold this preposterous theory, the proviso is adroitly construed into a legislative recognition of the right, on the part of the former owners of water, assumed by the state, and consecrated to the public use, to restrain the state from the sale of that water for hydraulic or other purposes. If this construction were admitted, the power to sell or dispose of the water would be nugatory. It could never be rightfully exercised without the consent of another, in any case where it could be shown that the water had once been private property. If the rights of the former owners are to be regarded, and their consent obtained as a prerequisite to the legality of the sale, the power claimed for the state had better at once be abandoned. For its exercise could, in most instances, be successfully challenged, it is believed on the ground of interference 271] with private rights—supposing *these rights to be retained by the former proprietors. Without advertent to the consequences resulting from the admission of such a doctrine, as

seen in the destruction which it would occasion to the best interests of the state, we maintain that the proviso was not intended to sanction a principle that would inevitably lead the state into collisions with the citizens, and expose it to the hazard of having its operations arrested, and its plans thwarted by every individual who might imagine himself to be injured, or his rights to be jeopardized.

No such intention could have been entertained, as certainly it is not expressed.

The construction contended for, has doubtless originated in a misconception of the persons whose rights were intended to be respected by the legislature. Not the former proprietors of water taken for public use, but the owners of lands adjacent to the water power, and whose lands, from their situation, might be exposed to the injury of being overflowed, or otherwise damaged by the use of the water, were intended to be protected by the proviso. At some of the points where water power has been brought into existence by the canals, the state has purchased a small lot of ground. But it is very certain that the water, after being used on this ground for propelling machinery, could not be confined within its limits, and consequently, the legislature foreseeing this result, provided against it.

We do not claim for the state, on account of its attribute of sovereignty, or otherwise, any higher or other right than an individual would have, to permit the water to flow on the lands of the adjoining proprietors. But lest such a claim might be advanced by the agents of the state, the legislature, from abundant caution, added the proviso in question.

It will be observed that the complainants have not asked relief on the ground of actual or threatened injury to their rights, as *owners of land* in the vicinity of the water power proposed to be sold; for no such injury, present, or prospective, is shown to exist. But they seek the interposition of the court on the ground of a pretended right to the water power itself; and they insist, in the prosecution of this right, that if the water be denied them, it shall not be disposed of to another.

*This conducts me to the consideration of the second question, namely: Whether the complainants have such an interest in the subject matter of controversy as entitles them to the relief prayed for.

The right of the complainants to so much of the water of Mad

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river as has been assumed by the state for the navigation of the canal, ceased and determined by that act of assumption; and they are as completely, and to the same extent, divested of all right and title to the *water* in dispute, as it is not denied they are to all that part of their *land* which was taken for the construction of the feeder. For aught appears, they gave or granted their right to the water. But supposing they did not, and that they claimed compensation for the injury, which was allowed and the money paid, what right have they to insist that they may pocket the money of the state, and at the same time control the use of the property they have lost? But suppose further, that application was made for damages, and the appraisers, believing none had been sustained, or that the residue of their real estate had increased in value beyond the injury done, refused to award damages, would these circumstances alter the case—would they impair the title of the state? As the question of compensation is not in issue; and as unfairness is not charged to have been practiced by the agents of the state in taking the property of the complainants, the title of the state is unimpeachable.

It is asked whether it would have been a legitimate use of the water, for the state to have sold to Seely a right to use it for hydraulic purposes, while he owned the ground which the state purchased from him, without regard to the *interest* and *rights* of the complainants? So to have proceeded, continues the argument of the other side, would have been an abuse of the power to take for public use. Its operation would be to take the *water of the complainants*, and to sell it to a third person. According to these views, the state has acquired no title whatever to the water of Mad river; for it is impossible, as a legal proposition, that the water can be owned at the same time by the state for one purpose, and by the complainants for another. If the state has a right to the use of it for navigation, the complainants have no right to the use of it for hydraulic purposes.

273] *If it would be an abuse of power to sell the water to a third person, it would be a more flagrant abuse of that power to *give* it away.

According to the argument of the gentleman the state's title is an amphibious thing—a perfect anomaly, and has no legal cognomen. Where the state uses the water for navigation then its title is perfect, and the complainants have no right to interfere—have no right to control the state in that particular use of the water. But should the state propose to use the water in another way,

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doing no injury to the interests of navigation, then the original rights of the complainants to the water becomes resuscitated, then it is they assert the right of reclamation, on the ground, it is presumed, that the state, by attempting to abuse its power, has forfeited its right to use the water, which has thereby reverted to the former owners. Or, perhaps the complainants mean to assert a visitatorial power only; such as belongs to the founders of eleemosynary corporations, to visit, inquire into, and correct all irregularities in the administration of its affairs.

But if it was intended to assert that a greater volume of water had been diverted from Mad river than was necessary to furnish an ample supply for all the purposes of navigation, then the language of counsel would be quite intelligible. If, however, it is intended to maintain that the complainants have a right, qualified or absolute, to the water assumed by the state, and which is necessary to supply the canal, we then resist the claim of the complainants, as one wholly irreconcilable with the power of the state to take private property for the public use.

Again it is said, that "at the point where this controversy arises the water power is not created by the canal. It exists independent of that work, and is the property of the complainants." That the water power is not created by the canal is an assertion we deny. Whether it was so created or not is a question of fact, which, if true, is susceptible of proof. The complainants, with the same right, and equal plausibility, might claim the water power created at any other point on the Miami line of canal as at the one in controversy. For there is not a doubt but that the water taken from Mad river, and to which the complainants lay claim, contributes *mainly to supply every level between Dayton [274 and Cincinnati. Hence it is clear, that any argument that could be employed to vindicate the claim of Cooper's heirs to the use of the water in the Dayton feeder, would as conclusively establish their right to the use of it at any point on the Miami canal. If it should be answered that they claim a right to use it at those points only where they own the land through which the feeder is located, and that the right asserted, is founded on the ownership of the land, we reply that all other proprietors of land on which the canal is located have an equal right to the use of the water on their own lands. And yet, in no other case has it been supposed that the ownership of the land through which the canal was located, drew

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after it a right to the use of any water power that might be created there.

We assent to the doctrine that makes the right of the state to assume private property depend on the public use to which it is consecrated; and by this test are we willing to stand or fall. We admit, too, that the lands ceded to the state, or those which it may have acquired by purchase under the provisions of the act of February, 1826, entitled an act to provide for the increase of the canal fund by the purchase and sale of real estate, are all held by the same title that would have been vested by an individual, had he acquired them in the same manner, or by the same conveyance. Nor do we pretend that the state, in the disposal of this property, is not controlled by the laws regulating the transfer of property from one person to another.

What effect have these concessions on the power of the state to sell, or otherwise dispose of the water power in question? None whatever.

Again, it appears from the pleadings and proofs, that the water proposed to be taken from the feeder, after employing it on machinery, is to be conducted into the canal at some point below, not far distant from the point at which it was withdrawn from the feeder.

By this operation the public use of the water is not discontinued, but it is applied in aid of individual arrangements, without destroying or lessening its capacity to subserve the public welfare. 275] In this manner it is made a source *of revenue to the state, and at the same time it performs the functions originally intended to be fulfilled by its acquisition. Ought this economy of the resources of the state to be denounced as an abuse of the power to take private property for the public use? It might prove a difficult task to maintain the proposition, that to employ the vast water power brought into existence by the canals for propelling machinery, is a use not "subservient to the public welfare," within the terms and spirit of the constitution. According to the most restricted interpretation of the power we are compelled to acknowledge the "public welfare" would be promoted by multiplying the sources of wealth and prosperity, by increasing the comforts and supplying the wants of large and populous districts of the state.

Water applied to machinery, in the various departments of labor, is capable of exerting an influence more directly and exten-

sively beneficial to the public than it could possibly do were it employed exclusively in navigation.

But the case is susceptible of being viewed in another aspect; and one which presents the power, for which we contend, in a light that dispels the doubts attempted to be thrown around it by the sophistry of the other side. The hydraulic power in question was created and brought into existence by the very act of constructing the feeder. It was the *effect*, not the *cause* of that work—it was the fruit or product of the capital of the state, expended for another object. Hence the power to dispose of it in the manner proposed is not less clear and incontestable than the power to levy and collect tolls from the canals, which are only fruits of another kind produced by the same cause.

Again: Take one of the cases mentioned by the counsel for the complainants, in which he admits that the state may lawfully assume private property for the public use. Suppose a mineral treasure discovered on the lands assumed for the erection of an armory, or other public buildings. To whom would it belong? To the state, or to the former proprietor of the land? According to every principle of law, no fraud having been practiced, it would be the property of the state. Would it be competent for the state to sell or lease the mine, as the only means of rendering it productive? *It would not, if the argument on the other side [276 in opposition to the power of the state to sell or lease water power, obtained by the construction of the canals, be well founded. Because it would be an abuse of the power to take private property for public use.

Were the armory, or other public buildings, necessary to subserve the general weal, they could not be erected without the land. It was, therefore, lawful to assume the land for a foundation to the buildings. But the ore in the bosom of the earth was not necessary to the erection of the buildings; it could not, therefore, be disposed of for any other purpose, without an abuse of the power to take the property of an individual and appropriate it to public uses.

According to his own principles, this would be the argument of the complainants' counsel.

Again: Suppose the state were to erect another capitol, and other public offices; would it be lawful to sell or let those now occupied? Or take a case precisely parallel with the one at bar.

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The state owns a lot of ground, containing ten acres, acquired for the purpose of erecting a state-house, and other public buildings. But there is more ground than is necessary for the erection of all the public buildings. Has the state power to let or sell the surplus quantity?

Nobody doubts it. Suppose a room in one of the public offices might be disposed of, for private use, without detriment to the public service. Would a law authorizing an agent to let or sell it be unconstitutional? No one can be found bold enough to answer affirmatively. It is unnecessary further to multiply examples to illustrate the nature of the power for which we contend.

The result of the inquiry demonstrates, we think, that the complainants have failed to show such a title to the subject matter in controversy, as authorizes the court to grant the relief prayed for.

3. But if the complainants have entitled themselves to relief, to what extent ought the injunction prayed for to be decreed?

A review of the testimony applicable to this point may be proper. And respecting the quantity of water required for the safe and 277] easy navigation of the canal, the proof discloses *the following, among other facts. That the quantity of water flowing in Mad river has never been ascertained, otherwise than by the measurement of Judge Bates, who estimated the minimum discharge at seventeen thousand cubic feet per minute. This estimate, in the opinion of Mr. Farrer, one of our engineers, is too high. He says that, when first filling the canal, ten thousand cubic feet per minute were thrown into it—that probably one-half of this quantity will be sufficient in all future time. At present there are six thousand cubic feet per minute conducted through the feeder into the canal, but the quantity is now greater than is necessary. The exact quantity of water required for, or used in the canal, has never been, and, he says, could never have been ascertained, on account of the influx of water from the saw-mill race. The whole quantity of water which it is contemplated to introduce into the canal from Mad river, after the bottom and banks shall have become more firm and solid, is three thousand cubic feet per minute. The average waste of water, by evaporation and leakage, is estimated at one hundred feet per minute, to every mile of canal. The water power belonging to the estate of Cooper would not be diminished, except by evaporation and leakage, in consequence of

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taking two thousand cubic feet of water through Seely's basin and canal; and the increased expenditure arising from these causes would, in the opinion of the engineers, be compensated by contributions of equal amount from the springs adjacent to that basin and canal, so that the loss of the estate would be nothing. It has never been proposed to take more water from Mad river than the quantity necessary for the supply of the canal. No additional quantity was intended to be taken on account of the two thousand cubic feet proposed to be sold.

Should the state use all the water delivered at the Tumbles, the estate of Cooper will have been increased in value.

Although it appears from this statement of the testimony, that the quantity of water required for the navigation of the canals has never been accurately ascertained, yet that more has been received into the feeder than was necessary for that purpose.

The excess, whatever it may be when correctly ascertained, is not, nor will it be claimed by the state.

*The answer of the defendant, on this point, is fully sustained by the evidence. He denies that he had ever caused or ordered more water to be thrown into the canal, at Dayton, than was wanted for easy navigation; and that, if a greater quantity had been taken than was necessary for that purpose, it was without his orders, and he had not been notified of the fact otherwise than by the bill.

He further denies the imputed intention to sell or lease water to such an amount as would increase the quantity required for navigation, and says that the sale of two thousand cubic feet per minute would not have that effect.

And so say some of the most intelligent witnesses in the case.

The successful operation of the great improvements undertaken by the state, required that its agents should be clothed with extensive discretion and powers; and sound policy demands that the right of individuals to interfere, except in cases where the abuse of power is *palpable*, ought to be cautiously admitted. It is not every instance in which the keen eye of *avarice* may detect the loss of an opportunity for profitable investment, that will sanction such an interference. Can the complainants interpose and arrest the career of the state before sufficient time had been attained to ascertain, by the test of experiment, the quantity of water necessary for the navigation of the canal. Almost before com-

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mercial operations had been commenced—before plans, requiring time to ripen them into maturity, had been executed; and before results, existing only in prediction, and seen only in prospective, had had time to be realized, the complainants arrest the state, and demand judgment? Whence the necessity of this hasty interference?

But supposing the redress which the complainants seek be within the competency of the court to grant, and that they have not mistaken the forum to which they ought to have preferred their complaint—let us inquire whether the court can decree a perpetual injunction to restrain the defendant from changing the location of the present feeder, for the purpose of creating a new water power. This the court will not do; because the defendant never attempted, nor did he ever entertain the intention to make 279] the change, here deprecated. *And further, the court has no cognizance of the subject—no power to determine the question whether it would be expedient or inexpedient for the state to change the location of a canal or feeder. This power belongs exclusively to another—namely, the legislative department of the government.

And as to the diversion of the water from the feeder, and the sale of it by the state, they are so many acts competent for the state to perform in right of its absolute ownership.

As to the prayer that the state may be enjoined from turning into the present feeder more water than would be necessary to supply the canal for navigation, the state is ready to do, voluntarily, all that it is sought to have done compulsively.

Besides, the court can not determine, from anything before them, what quantity of water is admitted into the feeder beyond what is necessary for the purpose stated. The whole quantity now taken into the feeder, and *that* required for navigation, being accurately ascertained by measurement, then the excess of the former over the latter would be the part to be enjoined.

But ought the court, having a due regard to the character and interest of the state, to go further than to enjoin, in general terms, the agents of the state from withdrawing more water from Mad river than may be necessary to supply the canal with a quantity amply sufficient for all the purposes of navigation. To do this, would leave the government in possession of a discretionary power, essential to the preservation of the canals, and to the ful-

fillment of the high obligations it is under to the people of the state. To do more, would be to presume that the government of the state was capable of committing deliberate acts of injustice and oppression toward its own citizens.

If the court makes such a decision as admits the existence of a discretion on the part of the agents of the state in determining the quantity of water which the exigencies of the canal, at the present, or in future time, may demand, then the court will have decided nothing which is now controverted.

It may be permitted to be said, in explanation of some things difficult to be understood without some knowledge [280] of paternity of this cause, that it may be traced up to the large capitalists of Dayton, with more propriety than to the complainants. Indeed, all its features and lineaments guide us to the true affiliation of the offspring.

It has not escaped the sleepless vigilance of the interested, that should the water power in question be sold, as contemplated, a rival town would spring into existence, and draw to itself a share of the business now transacted at the warehouses on the basin and canal. Then the point at which it is proposed to sell the water, would rapidly grow into importance, and probably check, temporarily, the growth of Dayton, requires not much forecast to perceive. Nor is it to be expected that the spirit of monopoly, after it has once got possession of the mind, will yield up its advantages without a struggle. These advantages, by long enjoyment, we are prone to regard, in the end, as our "rights and interests," and to complain of their loss as nothing less than the infliction of wanton injury.

Then the machinery of the complainants may be rendered less productive by the creation of rival establishments in their immediate neighborhood, but this is a damage for which the law has provided no remedy.

It is said that it is the right of the complainants to secure to themselves, if they can, the entire appreciation in value of all that is their own. And it is asked, if it does not interfere with the individual right of the complainants, to take this control of the water power from them, and dispose of it to others. And, in turn, we may ask, if it is not equally the right of the State to secure to itself the entire appreciation in value of all that is its own; and whether it is not an interference with this right for the complain-

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ants to take the control of this water power, and dispose of it to others? The right to improve what is one's own, and to increase its value by all lawful means, is certainly not denied. But this right is limited by a due respect for the same right in others. The appropriation of so large a portion of Mad river to the public use has probably had the effect to injure the complainants for a time. But it is equally true that the injury has been counter-
281] vailed by equivalent benefits, arising *from the appreciation of the residue of their real estate. Had no benefit, however, been realized by the complainants on account of the large disbursements of money in the construction of the canal, and the works connected therewith; still, as they were entitled to compensation, it must be presumed they have received it, to the full extent of the injury complained of. In either case the state acquired all the rights that belonged to the complainants; and, among these, the right to control the water power in dispute, and to dispose of it to others. The fatal error that taints all the reasoning of the counsel on the other side, in regard to the relative rights of the state and complainants, consists in the assumption that they have never parted with the ownership of the water, or that they and the state hold it by the community of interest; that both parties have a right to the use of the water in some way—the state for navigation, and the complainants for hydraulic purposes.

If the fallacy of this view has not already been sufficiently exposed, it is now too late to undertake it.

In conclusion, I beg leave to refer to the attempt to inculcate the defendant by a broad insinuation that he has prostituted his official functions to aid the interested views of unscrupulous speculation. To give color to the imputation, ingenious analogies are resorted to, and extraordinary coincidences are supposed—all tending to the proof of culpability. There is, however, not a fact established in the whole case which is inconsistent with that high character for integrity, firmness, and correct moral sensibility which the defendant has eminently sustained during the many years of his public employment. Since the publication of the argument of complainants' counsel, and with a view to repel the accusation leveled at the defendant, he has taken the deposition of Mr. Moore, and placed it among the papers in the cause. This deposition, to which I would respectfully invite the attention of the court, explains the nature of the connection which the defend-

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ant's brother once had with the projected improvements of Mr. Seely, and the time when that connection ceased. It shows conclusively that the defendant never had any interest, direct or indirect, in the success of that enterprise. No exculpatory evidence was, in the opinion of counsel, necessary; *but as the [282 defendant felt himself injured by the blow aimed at his public reputation, they acquiesced in the desire he expressed to remove even a groundless suspicion of misconduct.

Mr. KELLY, an acting canal commissioner, on the same side:

Four questions only seem, to my apprehension, to present themselves for decision in this case:

1. Have the commissioners, as agents of the state, discretionary power as to the location and manner of constructing the canals, feeders, and other works necessary for giving to those works the greatest capacity for usefulness and security?

2. Can that discretionary power, if it exist, be interfered with or controlled, except in cases of its manifest and wanton abuse?

3. Has there been any such wanton and manifest abuse of the discretionary power vested in the commissioners in the case at bar?

4. In cases where water is taken from any stream for the use of the canal, has the original owner such an interest or property in it that he can follow the water and claim a quantum of hydraulic power equal to that to which he had a right when the stream flowed in its original channel?

The two first questions seem to me to be so conclusively settled, both by common sense and all the principles of law and equity with which I am acquainted, that I will not pay so poor a compliment to the understanding of the court as to submit any arguments touching those points, but will barely remark that in the case of certain citizens of Chillicothe v. Canal Commissioners, praying an injunction against a certain location of the canal in the town of Chillicothe, the affirmative of the first and the negative of the second question were fully sustained by the Circuit Court of the United States, at this place, in January last. The right of locating necessarily includes the right of changing the location.

The evidence and admissions in this case completely establish *the fact that there has been no manifest and wanton [283

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abuse of the discretionary power vested in the commissioners; but, on the contrary, that to preserve a uniform flow of water into the canal, it was absolutely necessary that the agents of the state should have the entire control of the feeder and of the flow of water therein.

To arrive at a correct conclusion on the fourth point, it is necessary to take a more extended view of the case. The first question which presents itself in examining this question is, can this right of the original owner of the water, in the nature of things, be preserved to him, so that he can enjoy it without interfering with the rights of others? Economy and security of the work frequently require that feeders be so constructed, that the fall of the water which was originally distributed on the lands of two, three, or more owners, shall be brought together or concentrated at one point, and that point not on the land of either of the original proprietors of the power or fall. How, in such a case, can each claim and use his share of the power, without interfering with the other proprietors of the power, and especially without interfering with the owner of the soil? Again, can this ownership be exercised without interfering with the rights of the state as to preserving an equal flow of water? How far shall the agent of the state in such case control the flow of water, and how far shall the rights of the original owners extend in this respect? In cases where the state sells or leases water power, all these questions are settled by the arrangement of the works and by the terms of the lease or deed. But how are these questions to be settled in case the original owners follow the water and seek for and enjoy each his share of the power? Will the court settle these points, and fix the limits of the rights of the owners and of the state, by such rules and bounds as all parties shall understand and none shall ignorantly or willfully transcend? To my mind these questions present insuperable objections to the adoption of the principle that the original owner can follow the water and exercise acts of ownership over it.

If the original owners are divested of their rights by the appropriation of water to the use of the state, those rights must vest in 284] the state, and every principle of law, as well as every consideration of public benefit and convenience, conspire to establish the doctrine that the water power may be sold or leased by the state, and the country receive the benefit of its profitable use.

Elaborate arguments for the defendant were also submitted by

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Mr. EWING, and by Messrs. CORWIN & COLLET, the insertion of which would swell the report to an unreasonable length; they are therefore omitted.

No argument was presented in reply, the arguments for the defendant not being presented until the meeting of the court, and the complainants' counsel being absent, had no opportunity to read them until after the decision.

Opinion of the court, by Judge LANE:

The proof in this case shows, that the plaintiffs are the proprietors of a tract of land on Mad river, near the town of Dayton, upon which a valuable water power exists, and is improved, and that a greater power may be created by diverting a greater quantity of water from the river. That it is necessary to take from the river three thousand cubic feet of water per minute to supply the Dayton canal, by which the value of the plaintiffs' milling privileges is materially impaired. That the canal commissioners have erected a dam on the land of Findlay, which lies above, and have constructed a feeder which transmits the water from the river, first through Findlay's land, next through a part of plaintiffs' land, thence upon the land of another person, from which it again enters the plaintiffs' land, and joins the canal. That, in the construction of this feeder, a new water power is created, which may be used either on the plaintiffs' land, or on the intermediate land, and that the defendant, who is one of the canal commissioners, is about to sell the right of using two thousand cubic feet of water per minute, to be taken from the feeder at some point between the two portions of the plaintiffs' land, and returned to the canal below. The bill prays general relief; but the pleadings direct the attention of the court to two points, which comprise the remedy he asks.

It is not an objection raised by the defendant that he is but one of five commissioners, and that he only carries their [285 acts into execution; nor is a decree resisted on the ground that the whole board of canal commissioners are not principals acting in their own rights, but agents of the state only. The case is discussed by the respective counsel on the merits, and the court will view it in no other aspect.

We are first called upon to restrain the defendant from the unnecessary consumption of water. If it be proper for us to institute this inquiry, the evidence shows that three thousand feet per

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minute is necessary, for the ordinary supply of the canal, at this point, and that this is all intended to be taken. And, although some irregularities exist in the quantity introduced, that they arise, partly from the accidental influx from other sources, or, perhaps, partly from the inexperience or want of attention in the superintendent, yet they chiefly spring from the variable quantity flowing through the race of the saw-mill, a volume under the control of the defendant. The evidence, therefore, does not support the plaintiffs' claim. But if it were otherwise, I am not sure it would be within the proper duty of the court to control the commissioners in the manner of supplying the canal with water. The power to construct the canal is a high attribute of sovereignty; and in tracing the line—in selecting materials for its construction—in the introduction and management of the water—and in the thousand subordinate operations, attending the execution of so vast a work, there is a necessity for the exercise of large discretionary powers. The board of canal commissioners are selected with special reference to their possessing capacities adapted to this work, and although a case strong enough to justify our interposition may arise from corruption, from malicious intention, or caprice, yet, in the absence of these, the court would pause before it will assume to control the discretionary powers the law intends to confide to them. The security, for the faithful exercise of this discretion, is found, not in the superintendence of courts of justice, but in the individual reputations of the commissioners—in the tenure of their office—in their acting openly on the rights of others, in the face of a people vigilant to watch and acute to 286] *discern, and in their being exposed to the overwhelming force of public opinion.

The more important question in this suit is, whether the court will restrain the sale of the two thousand feet of water to be taken from the feeder, between the point where it emerges from the plaintiffs' land and the point where it again enters upon it. The determination of this depends upon the nature of the plaintiffs' interest in the water flowing down the feeder.

The interest of a riparian proprietor, where his rights are not limited by usage or convention, consists in an absolute right to any use he can make of the water, while passing over his land. He is bound to transmit it by its natural channel to the next occupant, and he is permitted to exact the same "servitude" from

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the proprietor above him. The right thus acquired, is not a right to the water itself, but an interest in the manner of its flow; for, the water in a running stream, flowing in its natural channel, is not a subject of property. 2 Black. Com. 18. The right, therefore, to all advantage of the river in its channel, to all benefit of the present mill race, and the right to create any other mill seat, which would permit the water to be returned to its natural channel before it left their land, were all vested and absolute in the heirs of Cooper, at the time of the creation of the canal, and they could not be deprived of them, except in due course of law.

It is upon these rights the state has assumed to act, by virtue of its transcendent sovereignty (*dominum eminens*), a power to appropriate private property for public uses, for the purpose of promoting the general welfare. This power is inherent in every government; but it should be exercised in cases, and for objects strictly public; and, in our country, the constitution of the United States, and of the State of Ohio, insure that principle of natural justice, which requires compensation to be made to the individual deprived of his property.

There is no doubt that a canal is such an object that private property may be subjected to its construction. By the act of 1825, St. 23, 56, 5, 8, the legislature have *authorized the commissioners to use the water of streams for this purpose, and the means of compensation is provided for those who suffer by the exercise of this power. The commissioners have abducted a portion of the waters of Mad river, by this authority, and the plaintiffs are entitled to a compensation for every injury resulting from this act. For every infringement of their rights—for every injurious interference with the control of their own property—for all detriment to a form of their mill privilege, they have received, and may receive satisfaction. And when satisfaction is thus made, and offered, their rights, so far as encroached upon, are extinct.

It remains to consider whether any new rights ensue from the transit of the canal, or its feeder, over the plaintiffs' lands, which entitle them to the relief they ask. In considering this question, it becomes important to ascertain the nature of the benefits, which ensue from the construction of the canal. They may be classed under the names of general or accidental. The general advantages are the facilities of traveling, accessibility to market, re-

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duction of the price of transportation, and the effect of these, in enhancing the value of land. The accidental advantages consist of the peculiar benefit conferred upon specific tracts of land, by the opportunities of basins, warehouses, and other commercial advantages; of all benefits of the water, consistent with its use for the canal, and for the means of navigation, etc., from waste gates. To attain the general advantages, was the precise end for which the canal was constructed. They were designed for all—they belong to all, and may be claimed by all. But the accidental benefits, although often of the highest moment to the individual, are of a nature so indefinite and uncertain, that no vested rights exist to exact them from the agents of the state. The owner of land can not compel the commissioners to select black acre rather than white acre for the line of the canal; and although there ought to be an indemnity for injuries, there is no justice in a claim upon the state to make compensation for profits which might have accrued under a different location. This view of the case seems decisive of the plaintiffs' rights. They might exact from Findlay, the 288] transmission *of the water to them through its ordinary channel; but this right, so far as it extends to the three thousand feet of water, is extinguished by the transcendent sovereignty of the state. The commissioners possessed the undoubted power to take it from the river, and to conduct it through the land of the plaintiffs, to the point where it is proposed to sell the two thousand feet; up to this point there is no cause of complaint; and in consequence of thus using the water, a right to full indemnity ensues to the plaintiffs, and they have no further right. The water of the river is not theirs; certainly not this water, which never touched their land, except through the feeder. We can recognize no greater claim in the plaintiffs than that which attaches to every proprietor of land through which the canal might be brought—no such vested right, in accidental benefits or expected profits, as give them authority to interfere with the discretion reposed in the public functionaries. No case of corrupt intention or of malicious design is shown; and we can not regard, as an abuse of power, an attempt to diminish the pecuniary burdens of the people, by means, which, in our opinion, are no violation of any vested right.

Bill dismissed.

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Judge BRUSH dissented :

A majority of the court are of opinion that the complainants have not made a case that warrants the interference of the court, in their behalf, to restrain the action and discretion of the agent of the state in the matter complained of. My mind has been conducted to a different conclusion. In assigning the reasons which influence my judgment, I do not purpose to answer the positions taken in support of the opposite opinion. I shall content myself with stating the case, as I understand it, and with explaining the principles of law by which I conceive the rights and the remedy of the complainants ought to be governed.

The material facts are :

First. The Miami canal has been constructed under the authority of law, from Dayton, on the Great Miami, to Cincinnati.

Second. The complainants, by descent from their father, *at [289 the time of the construction of the canal, owned a body of land adjoining the town of Dayton, through a part of which Mad river flowed, the water of which had been appropriated and employed, by the proprietor, for many years, in propelling grist and saw-mills, and factories of different descriptions, which were owned, and continued to be carried on, by complainants.

Third. In February, 1825, the canal was located. The plan required the water to be supplied from Mad river by a feeder, the course of which, with that of the canal and a basin, was settled upon and decided. Upon this plan the whole work was subsequently constructed and completed. The water was taken from Mad river, into the feeder, above the lands of the complainants upon the lands of the next adjacent proprietor, and above the dam from which they took the water for their own use. It was conducted through the adjacent tract into the lands of the complainants, and into the vicinity of their different water-works, and in such position as to be conveniently and safely used in aid of those works, and returned into the basin at the head of the canal.

Fourth. Before the water of Mad river was taken for the feeder there was an abundant supply for all the establishments of the complainants then in operation. But since the water has been used for the feeder there has been a deficiency of water, for the same operations, to an extent considerably injurious to these establishments.

Fifth. Subsequently to the completion of the canal some in-

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dividuals, owning land on the side of the feeder, opposite to the town of Dayton, constructed a canal, with a view to private profit, for which a supply of water could only be obtained from the feeder at a proper point. At this point the board of canal commissioners purchased a piece of land, lying upon both sides of the feeder, for the purpose of disposing of the water power of the canal for the benefit of the state. The respondent, as acting canal commissioner, in conformity with the law, advertised the sale of the water. The place where the water thus to be sold was to be used was so arranged that the water, after having been used, would flow into the new canal, and pass through it into the public canal, at a considerable distance below the town of Dayton, and would be diverted from its course in the public feeder through the lands of the complainants to the lands of the constructors of the new canal. It is to prevent this sale and diversion of the water that the bill is filed and the injunction asked. It was allowed by the court of common pleas, and comes here upon an appeal.

Before the location of the canal and basin, in 1825, the complainants were invested with a complete and perfect right to the use of the water of Mad river, for any purpose that it could be used upon their own lands. This right was subject to no other restriction, but that they should not flow it back upon the proprietor above them, and that they should return it into the bed of the river for the use of the proprietor below them. 2 Johns. Ch. 164. The state, in its sovereign capacity, had no right to any portion of it. In the exercise of its sovereignty it could take it from the actual owner for an object of public character and of public utility. But this assumption of private property can not be made for the use of the government. It can only be made for the use and benefit of the people; for that description of use which every citizen may enjoy in the same manner and upon the same terms. It is this kind of use that constitutes the "*public welfare*," which I conceive to be distinct from government interest, profit, or concern. It is only this great and common benefit to all the people alike that creates a necessity authorizing and justifying the seizure, by the government, of the private property of individuals. It is the people's prerogative, exists in the social compact, and is founded in the maxim, "*salus populi suprema est lex.*" The terms in which our constitution recognizes the principle, private prop-

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erty is "*always subservient to the public welfare*," excludes its assumption or use in any other way, or for any other object or purpose whatever.

However enlarged and liberal the exercise of this prerogative, by the sovereign power may be, or ought to be held, it must have some limit. It will hardly be maintained, by the wildest adventurer for power, that the state may, at pleasure, assume to itself the franchise, or other rights or interests of individuals, to improve and dispose of them for the purposes of revenue. The sovereign may take that, *without which he can not pro- [291 mote the general welfare, in the sense I understand it, and no more. And even this power would be without limit, or the limit of no avail, unless the line can be drawn with such certainty as to become a *rule*, capable of illustration, and of being so stated that all, who are subject to it, may understand it.

In the case before us, the legislature seems to have understood this doctrine as I do, and they have attempted the definition in authorizing the assumption of private property for the great "*public welfare*" of constructing the canal. The public agents are authorized to "*seize and take*" what is required for the public use, "*doing no unnecessary damage*." What does this mean, when reduced to a rule applicable to the case before the court? It seems to be plainly this: You may take from the complainants the use of their water necessary for the safe and secure navigation of the canal. But if consistent with this use, in the location where you have resolved to use it, a beneficial interest may still remain in them; you shall not deprive them of it. To do so is damaging them unnecessarily. To sell the water for government profit, in aid of the revenue, is to seize the complainants' property, not for the common use of all, in the same manner and upon the same terms, but is, in fact, fastening a burden of taxation upon ONE, which ought to be enforced equally upon ALL. This inequality of burdens is not necessary for the purposes of navigation, the great and principal object of the canal, and it is illegal if imposed for any other purpose.

I do not perceive how the case is affected by the position that the canal commissioners are clothed with the exercise of a sound discretion. The law certainly does not, and, indeed, under our constitution, could not, constitute them exclusive judges of what would be a sound discretion. That appertains to the judicial tribunals of the country. They alone can establish and apply the

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rule of right, where individuals are concerned. Where public agents are about to transcend the legal limits of their authority, courts of equity adjudicate upon the matter, and enjoin their irregularities if necessary. In the case of *Shawd v. Aberdeen Canal Commissioners*, 2 Dow. 519, Lord Eldon said: "If the canal 292] commissioners *exceeded their powers, they became trespassers, but chancery would restrain them by injunction, and keep them strictly within the limits of their powers."

In a still later case, an injunction was granted, in England, restraining defendants, acting under a private act of Parliament, from cutting a canal through land of the complainant in a manner not supposed to be within the equity of the statute. *Cooper's Equity*, 77.

Chancellor Kent cites these cases with approbation, 2 Johns. Ch. 168, 473, and admits that the complainant might have lain by and rested on his legal rights, and then brought trespass; but he was also at liberty to come into chancery, in the first instance, for a preventive remedy, and if there was any dispute as to the fact which course the complainant ought to pursue, chancery would direct an issue. It is a question of power, however an attempt may be made to confound its exercise with a sound discretion. In such a case, I believe it the safest rule, and the one most conformable to principle, and the letter and spirit of our constitution, to endeavor to ascertain the exact line of right, and then adopt Lord Mansfield's maxim, "*fiat justitia ruat cælum*."

The discretion confided to the canal commissioners by law is to assume private property for constructing the canal, and making it navigable. For these purposes, a necessity arises within the meaning of the terms "*public welfare*." But is there any *public necessity* for the sale of the water power in question? Such a sale does not aid the navigation. It only aids the state revenue. If made, will it lessen the value of the property of the complainants? I can not entertain a doubt upon these matters. The proposed sale of water power is not *necessary* to the "*public welfare*," and it must operate very injuriously to the complainants. If doubt pressed upon my mind, still I should incline strongly to fix the strictest limit upon the governmental prerogative of assuming private property for public use, taking care that the great object of the canal, its safe navigation, should not be defeated, or its benefits impaired. This navigation is, in my opinion, the only legiti-

mate object of the canal. So far, therefore, as any advantage to the state, or to its revenues, may be contemplated by this sale of water power to the *prejudice of private right, I think the [293 strictest rule should be applied. I think, too, that in the case before us, the contemplated sale of water power is a sheer state speculation at the expense of the complainants.

It is objected that the state, having assumed the water, is under no legal obligation to permit, or dispose of the use of it to any one. Consequently, it may be conducted in the feeder, through complainants' lands, and the use of it refused to them with impunity. This point is not now before the court, but, in respect to it, it may be remarked, that possibly a court of equity might deem itself authorized to compel the agents of the state to allow the complainants to use the surplus water on their own lands, taking care that such use should never prejudice the secure and easy navigation of the canal.

From the best view I can take of the case before us, its turning point seems to be this: May the respondent, as a public agent, for the purpose of aiding the public revenue, do as he pleases with the water, however much his doings may prejudice the individual rights and interests of the complainants? My response is, "*I am unwilling.*" Such, I think, ought to be the response of the laws and judicial tribunals of the country.

The converse argument runs thus: The canal commissioners have the *right*, that is, the *power*, to take the water out of Mad river, and conduct it, by a feeder, to the canal, for the purpose of navigation. Having it in motion, on the way to the canal, they may put it into market to raise revenue for the state, without any regard to the individual interests and rights of those who owned the use of the water before it was introduced into the feeder. I can not allow this. The discretion of all public agents, especially in the assumption of private property for public use, must be brought to the test of legal judgment. It must be controlled by some limit, and subjected to some rule. The application of that rule belongs to the judicial tribunals. They settle the bounds of official discretion, which has a continual tendency to encroach upon private rights. It is their province to arrest the exercise of that discretion, when it oversteps the requisitions necessary for the "*public welfare.*" In this light, the proposed *sale of water presents [294

itself to my mind, and I would prohibit it. If any given quantity

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of water can be taken from the feeder, and returned to the canal, without injury to the navigation, the only legitimate object of state appropriation, I conceive it should be left with the original owners, whose right is the oldest, the best, and ought to be exclusively enjoyed.

DANIEL JORDAN v. THE OVERSEERS OF DAYTON.

A patent issued by the United States, securing the exclusive right to manufacture and use certain medicines, does not authorize the administration of them, in the character of a practicing physician, without conforming to the laws of the state where administered.

ERROR to the court of common pleas of Montgomery county.

The overseers of the poor brought an action of debt, before a justice of the peace, against Jordan to recover certain penalties for practicing physic in violation of the statute regulating the practice of physic and surgery. The case was appealed to the court of common pleas, and judgment was there rendered in favor of the overseers of the poor; to reverse which, this writ was prosecuted.

The facts were agreed between the parties as follows:

It was admitted that Jordan, not being a member of any medical society of the state, and not being qualified to practice medicine, as required by the statute, did administer medicine to, and prescribe for one William Sullivan and one William Prigg, and received fees and rewards therefor. That on January 25, 1823, a patent was regularly issued from the United States to Samuel Thompson, granting to him, his heirs and assigns, for the term of fourteen years, the exclusive right of making, constructing, using, and vending to others to be used, a certain new and useful improvement, being a mode of preparing, mixing, compounding, administering, and using the medicine described in certain specifications thereto annexed, in the manner and in the diseases set forth in said specification. It was also further admitted that Jordan was the assignee of Thompson, and vested with all the rights 295] and privileges conferred upon *Thompson by the patent, and that the medicines prescribed and used by Jordan in his treatment of Prigg and Sullivan, were the same set forth in the patent and specifications, and were administered for the diseases therein men-

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tioned. Also, that on the — day of —, 1813, a patent was granted to the same Samuel Thompson with specifications substantially the same as those attached to the patent of 1823, and conferring the same rights and privileges.

CORWIN and COLLET, for plaintiff in error:

The defense set up, in the case agreed, requires the court to settle in the first place, the true construction and effect of section 11 of the act of February 26, 1824, entitled "an act to incorporate medical societies, for the purpose of regulating the practice of physic and surgery, in this state." It is under this section that the action is brought. We contend that the facts admitted in this case do not bring the defendant within the penalties provided in the law, and now sought to be recovered of him, as a practitioner of *physic or surgery*. The first clause of section 11 of the act incorporating medical societies is expressed in language which it is not difficult to understand, especially when interpreted in reference to the whole law, its intention, and the object had in view by the legislature. After making various provisions concerning the study of medicine as a science, plainly intended to provide modes and means by which that science, as now generally understood, should be taught, they go on, in section 11, to provide that "*no person*, other than the members of said medical societies, shall, after the 1st day of July next, be permitted to practice *physic or surgery*, in this state, and if any person, not being a member of said societies, shall *practice physic or surgery*, he shall not be entitled," etc. The first question to be determined is, what is the act designated by the legislature, using the terms just cited? It is contended, by the defendant in error, that every recommendation of any specific remedy for a particular disease is a practicing of *physic* within the meaning of this act; for such must be the ground taken, in effect, before a right of recovery can be urged against this defendant.

*The agreed case admits that the defendant, in two in- [296 stances *only*, did advise the use of some of the medicines mentioned in Thompson's patent, for some of the complaints enumerated in the schedule which makes a part of the patent. Every fact necessary to make out the plaintiff's case, which is not expressly admitted or proved, in a penal action, is presumed not to exist.

The law under consideration very clearly intended to prevent every person, not a member of a medical society, from presenting

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himself to the public as a person skilled in *the system* and science of physic or surgery, which it was its object to encourage, by providing persons known to be conversant with that science, as now practiced and taught, who should examine such as should present themselves, as properly qualified, by a thorough acquaintance with that science. This law, when it speaks of *physic* and surgery, means those sciences which treat of all known diseases, and propose the remedies for all, and not a patent for a medicine which is held out to the world as a remedy for one, or, at most, a very few of those disorders, which it is the province of a practitioner of physic to understand and cure. By an examination of the patent under which it is admitted defendant acted, it will be found that the diseases therein enumerated, to which alone the remedies he used are applicable, make up but a small portion of the disorders, which it is the province of a practitioner of physic to treat and cure. Hence, it is very clear that the selling and pointing out the application of these medicines alone, can not be said, within the meaning of this statute, to be the practice of physic, in the general sense in which it is there used. If such construction be put upon this section of the law, then every merchant or druggist who sells a bottle of Godfrey's Cordial, or of La Mott's Drops, or a box of Lee's Pills, is guilty of practicing physic, within the meaning of this act; for, in each of these cases, a printed list of the diseases in which the medicine should be used, with the quantity and number of the doses, is sold with the medicine; and this is prescribing and receiving pay for it, and yet it certainly has never been understood to be a practicing of physic, nor were such cases in the mind of the legislature, when they employed the terms above referred to in this act.

297] *Upon the grounds assumed by the defendants in error, every tooth-drawer, every female *accoucheur*, every nurse who applies any of the many effectual, simple cures of a burn, or ordinary flesh wound of a child, is a practitioner of *physic* or *surgery*, if it could be shown that any of these had received compensation for their labor, this being included.

But, in the second place, we contend that one, or even two instances of administering any medicine, can not be said to be a practicing of physic. This is done by almost every head of a family in this country. It is something more than this that is implied in the term practice, in the law under which plaintiff in

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error is sued. It is not only administering, prescribing, and selling medicine, but it is either a habitual and long-continued series of such acts, or it is a few instances of the kind, accompanied with a public profession of the character of a practitioner of physic, that constitutes the character in the view of the legislature. Neither of these cases is made out by the facts in this case. Jordan, it is not admitted or proved, ever held himself forth to the public as a doctor, nor can it be said that the two instances of his using the patent medicine, as set out in the agreed case, constitute him a practitioner of physic.

Second. The state legislature can not prohibit the profitable use, by the patentee and his assignees, of the medicines and discoveries specified in the patent.

By the constitution of the United States, art. 1, sec. 8, "The Congress shall have power to promote the progress of science and useful arts, by securing, for limited times, to authors and inventors, the exclusive right to their respective writings and discoveries."

By virtue of this section, Congress have vested in inventors, and their assignees, on the emanation of a patent, the exclusive use for fourteen years, from the date of the patent of their inventions. This delegation of power, from its nature, as well as from the expressions, "exclusive right," divested the state legislatures of all power of enacting laws concerning this grant. No act of the state government can restrict or control the beneficial or lucrative use of the patented invention, either by limiting the improvements which may be introduced into the state, or by limiting the number, or by prohibiting all persons, except a privileged class, from becoming purchasers or assignees of the invention.

It is contended, by counsel for defendant, that the patent is void.

First. Because the discoveries were not made by the patentee.

Second. Because the patent of 1813, issued for the same compositions of matter, and for the same applications of them, as are contained in the patent of 1823.

The patent is *prima facie* evidence that the invention is new and useful. Fessenden's Law of Patents, 61-63, 325, 326; Lovell v. Lewis, 1 Mason C. C. 182. The facts stated, in the agreed case, are an admission of every legal presumption arising from an inspection of the patent, and preclude every inference to the con-

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trary. How, then, can the defendant contend that, from the history of the science of medicine, with which we are not acquainted, it appears that those medical compositions, and their specific applications to diseases, are ancient inventions. He has not referred us to one citation of a scientific or medical author to support his allegation.

The patent of 1813 is not for the same discoveries as contained in the patent of 1823. From an inspection of the patents, it is apparent that there is a difference in the materials, and in the compositions of the medicines, as well as in the diseases to which each is specifically applied.

By the act of Congress, referred to in defendants' argument, a patent shall be granted for an improvement on a machine, for a new combination of matter, beneficially applied, or for a new and specific use of a machine or combination of matter already invented. If the patent of 1823 be a newly discovered combination of matter, differing in its proportions from that of either of those of 1813, or in its application to a disease, to which it was not applied, by the latter, the plaintiff can not be pronounced guilty.

In the agreed case, it is only admitted that the plaintiff, in two cases, received fees and rewards for administering to the sick some of those medicines contained in the patent of 1823, in some of those specified diseases.

299] *If the patent of 1823 should be void in part, where it pursues strictly the patent of 1813, it does not follow that it is not valid for the residue. The compositions of matter, and the mode of application to the case of particular diseases, are distinctly stated, and can be separated. It would not be a parallel case with that in which the patent issues for the right of a machine, previously discovered and in use, setting forth an improvement, without distinguishing the original machine from the same as improved. In Thompson's patents, each medicine and its specific application are distinctly stated. On the presumption in favor of innocence, the court would infer that the acts mentioned in the agreed case were pursuant to the valid part of the patent rather than to the void. Sentence of condemnation will not pass, on a defendant, where the case submitted to the court may be true, and the defendant innocent.

That the act of Congress does admit patents to issue to the

extent above stated, is apparent from its language and expressions.

The right of the state to tax the property thus patented, or to levy a tax on the income of the patentee and his assigns, produced by prescribing and vending those medicines, need not be disputed in the investigation of this case.

The power is not denied the state legislature to levy a revenue from patented machinery or its products. We do not contend that flour manufactured in the mills where Evans' elevator is used, or the whisky manufactured in patent steam distilleries, are exempt from state taxation. We only contend that it is not in the power of the state government either to prohibit the use of these inventions, or to impair the value of them, by limiting their sale, by the grant of the monopoly of purchase, and lucrative use of a few individuals.

The counsel for the defendants in error did not recollect, while inveighing against monopolies, that he was contending for the exclusive and profitable practice of the healing art of a privileged few; that to the certain and definite grant of vesting monopolies delegated to Congress, he was adding another monopoly, to be granted by the State of Ohio, concerning the same subject matter—the state legislature granting a monopoly of a monopoly.

*It does not appear that the plaintiff in error received [300 compensation for other acts than those authorized by the patent of selling to individuals, sick or in health, the medicines therein prescribed, and informing them of the expected effects to be produced by those medicines. This is a duty constantly performed, by unlicensed merchants and apothecaries, in the sale of patent pills and drops, either orally, or frequently by delivering to the invalid purchaser a printed paper or pamphlet, containing the prescription and certificates, exemplifying the wonderful cures to be effected by their nostrums. This was never considered as a violation of the penal law of Ohio. Should the agreed case be considered as an admission of the reception of a compensation for words and deeds, in attending the sick, other than selling to them the medicines and informing them of the cure to be effected, as stated in the patent, and this business should be considered worthy of reward (and the contrary can not surely be presumed), this gain annexed to it, having its existence exclusively as an incident of the patent, of right must belong to the patentee and

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his assigns, and can not be subject to the control of state legislation.

That the state legislature is vested with the power of prohibiting and punishing those who introduce poisons as medicines, or introduce, within their jurisdiction, immoral prints or books, whether patented or unpatented, can not be denied.

Whether the use of those specified patent medicines, by Thompson and his assigns, be promotive of or deleterious to the health of our citizens, we are as ignorant as were our ancestors with respect to the use of mercury as a medicine, which was introduced by a celebrated empyric and impostor, condemned for more than one hundred and fifty years by the licensed physicians, and brought into general use by the persons denominated quacks by the learned.

LOWE submitted an argument on the same side.

WICHER, for defendant in error:

The only question which seems to present itself in this case is:
301] Has the plaintiff in error practiced physic or surgery *contrary to a constitutional law of the land? The second clause of the sixth article of the constitution of the United States says that, "This constitution and the laws of the United States, which shall be made in pursuance thereof, etc., shall be the supreme law of the land;" and in the schedule of powers belonging to the Congress of the United States, we learn that Congress has power "to promote the progress of science and useful arts by securing, for a limited time, to authors and inventors, the exclusive right to their respective writings and discoveries." Hence, the plaintiff in error would infer that a state in the Union has no right to pass a law regulating the practice of physic and surgery which shall conflict with an interest which he says is secured to him by patent, in pursuance of a law of Congress; therefore the law regulating the practice of physic and surgery in Ohio, so far as regards him, is unconstitutional.

To refute this reasoning it is only necessary to state that a patent to secure to an author or inventor, etc., confers on him no right that he did not possess without a patent, except a right of monopoly. An inventor has the right to use his invention, in common with every other citizen, as well before as after the date of

his patent. A patent is an abridgment of the rights of the citizen, and secures to the patentee a monopoly of all the benefits arising from the lawful use of his invention, against all other persons wishing to use the same commodity. "A monopoly," says Lord Coke, "is an institution, or allowance by the king by his grant, commission, or otherwise, to any person or persons, bodies politic or corporate, of, or for the sole buying, selling, making, working, or using of anything whereby any person or persons, bodies politic or corporate, are sought to be restrained of any freedom or liberty that they had before, or hindered in their lawful trade."

After the statute of James was passed Hawkins defined a monopoly thus: "A monopoly is an allowance by the king, to any person, for the sole making, selling, etc., anything, so that no person be restrained in what he had before, or in using his lawful trade."

But in order to examine the whole ground which the case may, by possibility, occupy, we will examine the patent, and *the [302 laws under which he seeks to support it, in all their bearings. In the year 1813, the patentee, under whom the plaintiff in error claims exemption from the laws of Ohio, obtained a patent for a pretended new discovery in the principles and practice of physic. In consequence of a decision, by some court of justice in Massachusetts, against the validity of his patent, he, in 1823, took out a new one for some pretended new discovery. An inspection of the specifications attached to each patent will show the identity of the discovery. The following are the patents of 1813 and 1823:

SPECIFICATIONS OF 1813.

- No. 1. Lobelia for emetic.
- No. 2. Cayenne.
- No. 3. Marsh rosemary, two parts; the bark of the roots of barberry, one part; or sumach bark, leaves, or berries, or raspberry leaves, may be substituted.
- No. 4. Balmony, barberry bark, and poplar bark.
- No. 5. To strengthen the stomach and restore the digestive powers, after cases of dysentery and other weakening disorders: Make a syrup of peach kernels, or cherry stones, gum myrrh, hot water, and sugar.
- No. 6. High wines, gum myrrh, camphor, cayenne, and spirits of turpentine.

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SPECIFICATIONS OF 1823.

No. 1. *Lobelia inflata* for emetic.

No. 2. Cayenne, capsicum.

No. 3. Barberry bark and hemlock bark, or sumach bark, leaves, or berries, or red raspberries, or witch hazel leaves, or marsh rosemary and pond lily roots, or either of them.

No. 4. Balmony, barberry bark, and poplar bark.

No. 5. To make syrup for dysentery, promote digestion, and strengthen weak patients: Take poplar bark, the bark of the barberry root, sugar, peach meats, or cherry stones and brandy.

No. 6. High wines, gum myrrh, cayenne, to be given internally; when applied externally, add spirits of turpentine.

303] *Vapor Bath.

None of which he states, in both specifications, hath been known, or used, before this application!

The court will not close their eyes against the absurdity of these declarations, made by the same person, with an interval of ten years between the times of making them; nor will they require to be informed by me, what they are already informed of from history—that both statements are utterly false; and if false, the patent is void.

The act of Congress, passed in 1793, entitled “an act to promote the progress of the useful arts,” provides “that when any person, or persons, being a citizen of the United States, shall allege that he, or they, have invented a new or useful art, machine, manufacture, or composition of matter, not known or used before the application, and shall present a petition to the secretary of state, signifying a desire of obtaining an exclusive property in the same, and praying that a patent may be granted therefor, it shall, and may be lawful, for said secretary of state to cause letters patent to be made out in the name of the United States, etc., granting to such petitioner, or petitioners, his, her, or their heirs, administrators or assigns, for a term, not exceeding fourteen years, the full and exclusive right and liberty of making, constructing, using, and vending to others to be used, the said invention or discovery.”

The statute of James leaves to the crown the right to grant letters patent for “the sole working or making of any manner of new manufactures to the true and first inventor.” That of the United States authorizes letters patent to be issued to any person who has invented “any new or useful art, machine, manufacture, or composition of matter, not known or used before the application.”

These clauses are respectively the foundation upon which the law of patents rests in the two countries; and although the phraseology differs, they are in substance the same. There is a remarkable coincidence in these fundamental provisions of the two acts "Any manner of new manufacture," is equivalent to "any new or useful art, machine, manufacture, or composition of matter." The judicial expositions, therefore, of each will be mainly applicable to the other. The clause of our statute *just recited pre- [304 sents for our consideration the term "new." The "art, machine, manufacture, or composition of matter," for which a patent is claimed, must be "new." In relation to this point, the British statute has received a construction, which seems to me, to be at variance with its whole scope and object, and can not be justified, by any rules of construction applicable to the English language. It has been decided that a manufacture, brought from abroad, if new in England, is a new manufacture, within the meaning of the statute. The words are, "the sole working, or making any manner of new manufacture, within the realm;" not manufactures new within the realm. The working and making must be new within the realm, and the manufacture new—new everywhere. What kind of a new manufacture is that which is known the world over, though not yet introduced into England? What sort of a new machine is it, that has been in use for centuries in a neighboring kingdom? And what sort of an inventor is he who makes a trip across the channel to get it? But he must be an inventor; for the statute allows patents to issue only to the "true and first inventors." A patentee, therefore, must be an inventor, and he must swear to it, too, to bring himself within the act, or the king will withhold the grant. The received opinion, then, of the statute of James appears to me to involve gross absurdities, and to be a palpable perversion of the terms and plain meaning of the act. It is a departure from its spirit, and defeats its avowed object. It is everywhere said that this prerogative power was left in the crown, for the purpose of rewarding the personal merit of ingenious men—to stimulate their inventive powers. But this alleged object of the act is at war with its practical application, and places the plagiarist and the original inventor upon the same footing. This construction is given to the statute, in the case of *Elgebury v. Stevens*, the first reported decision upon the statute of James, and has its origin, I have reason to believe, in the policy of the

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government. Expediency, and the policy of the state, have, no doubt, contributed to uphold it. It has been uniformly adhered to, and is everywhere laid down as established law; but I have nowhere seen it supported as the true and grammatical construction of the language of *the act. The policy may be good; but it ought to have been supported and authorized by a legislative provision; and not founded on a judicial perversion of the language of the law.

But fortunately our own statute is not liable to the ambiguity upon which I have remarked. It allows patent monopolies to those who have invented "any new and useful art, machine, manufacture, or composition of matter not known or used before the application." This clause of the act of 1793 is plain and explicit. It is not obscured by an artificial arrangement of words, generating doubts to be resolved by policy or expediency. The art, etc., must be new; not new in one place and old in another, but new both at home and abroad. A patentee must be the "inventor," and the subject of the patent must be the result of his own labors and ingenuity—not for a stolen or borrowed product. If the act of 1793 left room for a doubt, which it does not, that of 1800 would remove it. That act very clearly develops the policy of the legislature. Its provisions, and the oath it prescribes, show, too obviously to admit of doubt or misconception, that it did not mean, in any case, to grant patents or monopolies for imported or borrowed novelties, but to leave their introduction to the enterprise of the public.

While, therefore, in England, it is deemed enough if the manufacture, for which the patent is claimed, be new *within the realm*, here, I hold it most clear that the art, etc., must be *absolutely new*. It must not have been "known or used before the application," and if it were, that the patent, if obtained, would be void.

I can not so much undervalue the good sense of this court as to use an argument to show that the art, etc., must be new at the time of the application; section 3 is conclusive on this subject [read section 3]. If the act does not refer to the time of the grant of the letters patent, but to the time of the invention, why are all these descriptions necessary? The date of the discovery, then, must be determined by the date of the patent; for the discovery must have been new and not used when the patent was issued. And, in the language of the statute, "every patent which shall be

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obtained, etc., for any invention, etc., which it shall afterward appear, *had been known or used, *previous to such application* [306 for a patent, shall be utterly void."

If, then, the defendant shows, that the thing pretended to be secured by patent, was in use, or had been described in some public work anterior to the date of the patent, he shows that it was so anterior to the supposed discovery by the patentee; for the discovery must be coetaneous with the patent.

Another objection to the plaintiff's patent is, that he has not, in his schedule, "furnished a written description of his invention, in such full, clear, and exact terms as to distinguish the same from all other things known before, so as to enable any person skilled in the art, etc., to make, compound, and use the same." If he does not communicate it so that it can be understood, what matters it whether the concealment be the result of fraud or negligence? In either case the public receives no equivalent for the benefit conferred upon him. It must be borne in mind that the patent or monopoly is granted in consideration of the full, fair, and intelligible disclosure. What a man has invented or discovered, it is fair to presume he can describe intelligibly; and defects in the specification, in all cases, avoids the patent. How is the design to be proved? It seldom, if ever, can; and the public may, oftentimes, after much wealth has been accumulated by the individual, and the patent expired, be left as ignorant as before it was granted.

It has been shown, then, I think, satisfactorily, that the subject of a patent must be both "*new*" and "not known or used before the application." It must also be "*useful*." This term has been defined to mean *such an invention as is not frivolous, or injurious to the well being, good policy, or sound morality of society. Such an invention as may be applied to some beneficial use in society, in contradistinction to an invention which is injurious to the morals, the good health, or the order of society*—not mischievous to the state.

What can be less useful than a patent that interrupts the practice of an art, etc., commonly known? What more pernicious to the state than the monopoly of a medicine or manufacture already in use?

But, says the plaintiff, inasmuch as the patent is issued it *is presumed it is conclusive evidence that the patent was [307 rightfully issued, and, consequently, that the several states of this Union must refrain from the execution of any law made for the

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protection of their citizens. But it can not escape the attention of this court, that patents are issued, as a matter of course, to all who will apply for them, swear they are inventors, and pay thirty dollars. The letters patent, it is true, when prepared, are sent to the attorney-general, who, however, never inquires into the merits of the subject, but merely takes care that the instrument is in due form.

Still I can not perceive that the argument, to which the above is an answer, has anything to do with this case. We do not seek to abridge the plaintiff of any right which he can legally enjoy. We do not wish to use his patent. The plaintiff has no more right to complain of our statutory regulation of the practice of physic, nor claim exemption from its penalties, than the patent whisky makers have from those laws which impose regulations for the sale of that article, or commodity, or composition of matter. Yet, I believe, this is the first time that any person, because he was a patentee, claimed to be above the cognizance and jurisdiction of state authorities, notwithstanding there are patents for everything we suffer to enjoy, for everything that comes within the scope of legislation.

Opinion of the court, by Judge LANE :

The case presents two questions: 1. Whether the evidence sufficiently shows that the defendant practiced medicine; and 2. Whether section 11 of the statute, imposing a penalty for practicing medicine by persons not members of any medical society, is inoperative on him, by reason of Thompson's patent.

On the first point, the case shows that Jordan *prescribed and administered* medicines to two sick persons for fees. The stipendiary character of the service forbids the belief that it was an act of neighborly kindness, or the execution of a moral duty. Administering medicine may be the office of a nurse; but prescribing medicine to the sick, implies the exercise of skill in the discrimination of diseases, and the *selection of fit remedies; to acquire which skill is the object of medical education, and to exercise which, for fees, is but another name for the practice of medicine. In the absence of explanation, we believe the statement sufficiently shows that Jordan, in these cases, acted in the character of a physician.

In discussing the second question, I choose to divest the case of

all matters, except those arising from its simplest merits. For present purposes, therefore, I assume that the right of prescribing and administering medicines, is a proper subject for a patent, and that the patent of 1823 is to all purposes regular and effective. I proceed to consider, whether the patent conveys such a right that the authority of the state may not control its exercise.

A large portion of the duty of the lawgiver, in every civilized community, consists in regulating the conduct of individuals, in different matters, for purposes of general welfare. Some acts of this nature are the objects of penal legislation. There is no moral turpitude in vending tickets of lotteries from other states, or in selling spirituous liquors to Indians; yet the good of society demands their prohibition. Other and the larger class are, in various forms, regulated by law. Thus, the act of keeping tavern is a lawful trade; yet, because it is of public concern that the convenience of travelers be secured, and because it is conducive to public morals that intemperance be suppressed, the legislature have forbidden its indiscriminate practice, and have placed those engaging in it under the watch of the court. And for reasons in some respect similar, peddlers and ferrymen are placed under the same supervision. The exercise of police powers by municipal corporations, the laws concerning the inspection of provisions, and the fixing of rates of toll for turnpikes and bridges, are examples of similar powers. So the business of grinding grain, a work strictly private, interests so many persons, that the legislature have deemed it proper to fix a price for labor. So the profession of law is of so public a nature, that its practice is wholly forbidden until after a reasonable demonstration of ability, and until after an opportunity has been offered to learn the morals of the practitioner. And the profession of medicine is regarded, by the legislature, as of a similar character, so that policy requires an examination *should be instituted into the professional capacity [309 of the practitioner before he shall be permitted to operate upon the health of citizens. In all these cases the interpretation of the law given, is justified by the obvious principle, that although a man's rights to his own are absolute and indefeasible, yet these rights must be so used as not to infringe the rights of others, and may be so regulated as to promote the general good.

But the plaintiff in error, without denying these matters to be the suitable and ordinary subjects of legislation, insists the power

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of the legislature is limited in this case, because the patent, securing to Thompson the exclusive right of preparing and mixing medicines, emanated from the general government, under the authority of the constitution, and that its full effect can not be had unless it be holden altogether exempt from state control. This leads us to consider the nature and extent of such rights as accrue from letters patent for useful discoveries. Although the inventor had, at all times, the right to enjoy the fruits of his own ingenuity in every lawful form of which its use was susceptible, yet before the enactment of the statute he had not the power of preventing others from participating in that enjoyment to the same extent with himself; so that, however the world might derive benefit from his labors, no profits ensued to himself. The ingenious man was therefore led either to abandon pursuits of this nature, or to conceal his results from the world. The end of the statute was to encourage useful inventions, and to hold forth as inducements to the inventor the exclusive use of his inventions for a limited period. The sole operation of the statute is to enable him to prevent others from using the products of his labors except with his consent. But his own right of using is not enlarged or affected. There remains in him, as in every other citizen, the power to manage his property, or give directions to his labors at his pleasure, subject only to the paramount claims of society, which requires that his enjoyment may be modified by the exigencies of the community to which he belongs and regulated by laws which render it subservient to the general welfare, if held subject to state control. If the state should pass a law for 310] the purpose of *destroying a right created by the constitution, this court will do its duty; but an attempt by the legislature, in good faith, to regulate the conduct of a portion of its citizens, in a matter strictly pertaining to its internal economy, we can not but regard as a legitimate exercise of power, although such law may sometimes indirectly affect the enjoyment of rights flowing from the federal government.

Judgment affirmed.

LESSEE OF GEORGE N. HUNT v. NATHAN GUILFORD.

Question of boundary of the out-lots of Cincinnati.

Alleged revocation of a submission to arbitration left to the jury upon evidence.

An agreement to submit a question of boundary to arbitration defeats the operation of the statute of limitations.

THIS cause was adjourned here for decision from the Supreme Court of Hamilton county. It came before the court upon a motion for a new trial made by the defendant, where the plaintiff had obtained a verdict in an action of ejectment. The case is stated in the opinion of the court.

FOX for the new trial.

PENDLETON against it.

Opinion of the court, by Judge BRUSH:

The ground in controversy, in this action of ejectment, was about fifty-nine and a half feet wide at one end of out-lot No. 12, in the city of Cincinnati, and forty-six and a half feet wide at the other end and west end of same lot on the north part of the lot; which ground, by mistake, had been inclosed within the fence, made round out-lot No. 13, adjoining No. 12 on the north. Plaintiff's title was made out as follows:

First. A deed from John Cleves Symmes to Jesse Hunt, for out-lot No. 12, dated February 21, 1809.

Second. A deed from Jesse Hunt to the lessor of the plaintiff, for the same lot (No. 12), dated August 20, 1820.

311] **Third.* An agreement in writing, as follows, viz:

"Whereas, doubts and uncertainty exist respecting the distance which each out-lot of the town of Cincinnati ought to extend north, from the northern boundary of Seventh street or Northern Row, agreeably to the plan and records of the said town, and in order to do away all doubts and disputes that may hereafter arise respecting the same, know ye, that we, the undersigned owners of out-lots, do agree to submit, and by these presents do submit, the matter in doubt and uncertainty to the judgment and award of Martin Baum, William Lytle, O. M. Spencer, John S. Gano, and John S.

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Wallace, commissioners to settle and fix a true line of each of said out-lots, who are hereby authorized to call witnesses before them, or such other testimony as they may deem necessary. And it is agreed that their award shall be final and binding on the parties hereunto subscribed. Dated April 10, 1816." Signed by twenty-eight persons (one as the guardian of heirs). Among the rest, by Jesse Hunt, the person under whom the lessor of the plaintiff claimed title, and William Woodward, under whom defendant claimed title. A report and award, in writing, as follows:

"We, the undersigned, having been chosen by D. E. Wade, Abdeel Coleman, Daniel Symmes, James Ferguson, and others, as appears by the annexed instrument or submission, owners of out-lots in the town of Cincinnati, to fix the true lines of said out-lots, having caused an accurate survey of said out-lots, by Joel Wright, town surveyor of said town, which said survey or plat is hereto annexed, and having fully examined said plat, and being convinced that it is the most correct and equitable plan of establishing the boundaries of said out-lots, do award and determine that the lines or boundaries shall be established and fixed according to said plan, making the width of said out-lots, from northwardly to southwardly, about four hundred twenty-six and a half feet, and extending eastwardly and westwardly half the distance between the present streets, and now running from toward the Ohio northwardly. We do further award and determine that the principle or standard on which the annexed plat is made, shall be to divide the distance from the north side, Northern Row, along the east
312] side of Vine street, *to the northern boundary line of said out-lots, as lately established, into eight equal parts, and from the points made by such division to run lines eastwardly and westwardly, parallel to Northern Row, as far as the plan of said out-lots extends, which lines shall be the northern and southern boundaries of said out-lots.

"Given under our hands, at Cincinnati, this 15th day of February,

"MARTIN BAUM,
O. M. SPENCER,
JOHN S. WALLACE,
WILLIAM LITTLE,
JOHN S. GANO."

Upon the plan or map referred to in the above award, as annexed thereto, the said surveyor certifies thus: "I hereby certify that I have surveyed Cincinnati out-lots, agreeably to the construction of the commissioners, which is further exhibited by this map, and the distance that each lot extends northwardly is stated, on the east line of Vine street; and the area attached to their respective numbers. Second month, 1817. Joel Williams, T. S.;" and underwritten on same, "Recorded, March 20, 1817, in book R, page 23, Thomas Henderson, recorder of Hamilton county, Ohio."

On the trial, the plaintiff objected to the admission of the above agreement, award, and map or plan of that part of the town, as not legal and competent evidence in this action of ejectment.

The objection was overruled, and the evidence admitted as proper to show the character and nature of plaintiff's possession, whether adverse or not, and to furnish some evidence where the original line was actually run, thereby to show that the fence to which the defendant claimed was on the lot No. 12, and included part of it within the inclosure round No. 13.

Fourth. General William Lytle, one of the commissioners, testified that the principle by which the commissioners ascertained and established the lines between the out-lots, was as stated in the award; that they, or the surveyor, stuck stakes at the corners of the lots, and at every corner *on the streets from Seventh [313 street, or Northern Row, north to the northern boundary line of the town. That Seventh street was agreed to be the southern boundary and base of the award. That Vine street was that by which Ludlow laid off the town, and made the original plat or plan as recorded (which was in evidence), and that the ground for the out-lots was divided into eight equal parts. And that persons generally were satisfied with the division made by the commissioners. Cross-examined: he has no recollection that Mr. Woodward made any objections, or revoked the authority of the arbitrators.

Joseph Gest testified, that in running the line between the lots Nos. 12 and 13, agreeable to the new survey, he found it on Broadway (the east side of the ground in controversy), to be fifty-nine and a half feet north of the defendant's fence, and on Sycamore (west side of the ground in controversy), forty-six and a half feet north of the fence. The streets now laid out and improved are agreeable to this new survey. That the streets north

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of Seventh street, running east and west, have all been laid out since 1816 by the proprietors. That there are more than four acres of ground in each of the out-lots so established; that there is no street laid out east and west, east of Main street, and north of Eleventh or Canal street. That the sycamore tree is at the west end of the fence at the southwest corner of No. 13, as inclosed and claimed by plaintiff, and he has understood it has been called a corner.

For defendant, Wm. Woodward testified. He thinks it was in 1793, when he purchased the lot No. 13. The deed is dated 1795. Captain Benham and James Dement owned No. 12 at that time. It was planted with a peach orchard. Fifteen or sixteen years ago, the present fence between the lots was built. Mr. Henderson run the line, and carried it about thirty feet north of the old line. The sycamore was then the corner of No. 13, the southwest corner. Henderson's line runs east from that tree, so far north of the fence on the east side, as to have thirty feet between it and the fence, leaving out of my lot a triangular piece of ground. I went before they (the commissioners) had dispersed, and told 314] them I must revoke what I had done. I could not consent to alter my fences, but must continue to hold as I had done. Some person, one of the body, said, then if I don't sign it, it will be of no use to record it. Mr. St. Clair said, yes, by God, we will record it. I have occupied out-lot No. 15 more than twenty-five years. The south fence of No. 13 did not run the course of the lines between the lots.

R. R. Williams testified, he was in the room where the commissioners were—Mr. Woodward stepped up and put his hand upon the paper, and said he would revoke what he had done. It was soon after they had gone into the house. Mr. Hunt was in the room I think. General Lytle, Mr. St. Clair and others were present.

Mr. Henderson presumes he did not find any old traces of old lines. One corner which he found agreed with the new lines, and one did not, but varied a little. My impression at that time was, that the out-lots were intended to contain, and did actually contain, four acres, strict measure. He surveyed a good deal there for Judge Symmes and Joel Williams.

There is not a general satisfaction by the claimants in the new

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survey. The north line of the town is a section line. Originally and now those out-lots extended to the section line.

Defendant then gave in evidence :

A deed from J. C. Symmes to said William Woodward for fraction north of No. 8, dated September 7, 1804.

A like deed for out-lot No. 8, same date.

A like deed for out-lot No. 13, dated October 1, 1795.

Another deed from Levi Woodward to William Woodward for out-lots Nos. 21 and 22, and fraction north of Nos. 21 and 22.

Plaintiff's rebutting evidence :

Oliver M. Spencer testified. He was one of the commissioners, and has no recollection that Woodward revoked the submission. Does not know that any one attempted to act upon the submission or award.

Colonel John S. Wallace, one of the commissioners, testified: He does not recollect that there was any objection made by Mr. Woodward to the submission or award, or that he pretended to revoke the same. That there were stakes set *down for the [315 corners of the-out lots, and people occupied, and improved, and fenced accordingly. Cross-examined: David Logan inclosed the lot No. 13, and assisted my father to inclose the lot No. 14. Logan inclosed the lot No. 13 in 1791 or 1792.

Defendant's counsel then gave in evidence a deed from J. C. Symmes to John Machin, for out-lot No. 15, dated January 6, 1799. There was a verdict for plaintiff, and a motion for new trial, reserved for decision, etc.

The reasons, as stated, are: 1. Because plaintiff did not show any sufficient title to make an entry, on the premises described in his declaration.

2. Because said verdict is contrary to evidence.

3. Because the statute of limitations was a bar to the plaintiff's recovery.

4. Because the court mistook the law in charging the jury.

To the first objection, or reason assigned, it may be sufficient to say that the plaintiff proved a perfect legal title in his lessor, which has usually been considered a sufficient right of entry to maintain an action of ejectment, *prima facie*. Again, the award if found by the jury, to have been made, before revocation of the authority of the commissioners, or arbitrators, establishes a right of entry sufficient to entitle him in whose favor made to recover

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in ejectment. *Sellick v. Adams*, 15 Johns. 199; *Doe, Morris, and others v. Rossu*, 3 East, 15; 2 Caine, 199, 320.

If by the second reason assigned (that the verdict is contrary to evidence), is intended that there was not evidence that defendant was in possession of the premises at the time the declaration was served upon him, the answer that he relied so much upon the fact, that he was so in possession, and that he, and those under whom he claimed title, had been so in possession, from the year 1793, might reasonably be considered sufficient, without any formal proof of that possession. The chief ground of his defense being, the bar which the statute of limitations interposed in such cases, would have no foundation in fact, unless such possession was proved or admitted. In this case, it was not disputed, and was considered by the court, as yielded on all sides, at least by 316] the *plaintiff; and was most strenuously maintained by defendant's counsel. The matters litigated at the trial, and which only are entitled to consideration, were, first, the true boundary between the two lots Nos. 12 and 13. If that was found to be any considerable distance north of plaintiff's fence and possession: then, secondly, was that possession adverse to plaintiff's title, or subordinate; thirdly, did it continue adverse twenty years, from the taking effect of the statute of limitations, June 1, 1804, before the commencement of this action, November 8, 1824. Or did its adverse character cease, by the acts of the parties, in entering into the submission and agreement aforesaid, and the making the award above set forth? Both, or either?

The question whether the submission, and the authority by it vested in the commissioners to make the award, was revoked by Mr. Woodward before the award was completed, or not, was left to the jury, being matter of fact, proper for their determination. They were advised that it was incumbent on the defendant to satisfy them that the power had been so revoked, before the award was completed, else the award would be valid against Woodward, and all claiming under him—that the law not only allowed parties, to settle amicably their controversies, and in this way, but favored such settlements, and when they so appeared, slight proofs should not destroy them. It ought to be strong and convincing. The jury, upon the evidence stated above, have found this matter in favor of the plaintiff, and the court are satisfied with their verdict. I should be very unwilling to believe

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those commissioners had allowed that document to be recorded, without noting on it the fact that Woodward had revoked the submission, if he had actually done so, before it was completed. Three of them now testify, they have no recollection of it, if he did. His own testimony leaves the impression that he did not announce his intention to revoke, until too late, after the commissioners had finished, and no longer could control their doings in that respect; when nothing remained to be done but to record the instrument. The testimony of Williams makes the same impression: he says Mr. Woodward stepped up and put his *hand* on the *paper*, and said he should revoke, etc. Neither of these *wit- [317 nesses, or any other, state any act done by the commissioners, or either of them, as signing the award, after Mr. Woodward spoke of revoking their authority. The award being thus properly established by the jury, its effect is decisive, in this action, and upon this motion for a new trial, which accordingly should be overruled. Were it necessary, in this case, I should feel at liberty to say that the agreement ought, and would have the effect in law, to preclude Woodward, and all claiming under him, knowing it, from insisting on the bar of the statute, or that his possession was adverse. In 9 Johns. 104, it is said: "This possession has continued nearly forty years, and would be conclusive, unless the *agreement* said to have been made in 1790, should be sufficient to take the case out of the statute of limitations." In Doe v. Rossu, above quoted, 3 East, 15, the court say: "The award can not have the operation of conveying the land. But there is no reason why the *defendant* may not conclude himself by his own *agreement*, from disputing the title of the lessor in ejectment." 5 Dane's Abr. 137, ch. 141, art. 7, sec. 9. "The defendant is concluded by his own *agreement* from disputing the title of the lessor in ejectment." 2 Caine, 320. If, then, the award did not bind the defendant, the agreement did, and then it would be a question of fact for the jury, where was the true line between the two lots? It was so left to them, and they have found, and correctly, upon the evidence, that by that line the plaintiff is entitled to a piece of the ground, as part of No. 12, which is included within defendant's fence, as part of No. 13. Upon no principle is the verdict contrary to evidence; nor do I think the defendant can rely on the statute as a bar. As to the charge, I concur with my brethren that it was nothing erroneous or against law.

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318] *CHARLES C. PAINE v. JACOB FRENCH AND JOHN FORD.

Assignment of debt secured by mortgage, and delivery of mortgage deed, good transfer of the mortgage.

Before the act of 1818, seal of justice was not required to an acknowledgment of deed, except in a case of *feme covert*.

Holder of a recorded mortgage does not act fraudulently, if he prepares, as counsel, a subsequent mortgage and remain silent as to his own.

Allegations and proofs must correspond.

THIS was a suit in chancery, to subject to sale certain mortgaged premises, and was reserved from the county of Geauga. The bill was filed by Charles C. Paine, as administrator, with the will annexed, of Samuel W. Phelps, and set forth that on June 8, 1813, the defendant French, who then owned the premises in controversy, mortgaged the same to one Daniel S. Coit, to secure the payment of five hundred dollars, which mortgage was duly recorded, and afterward, on May 18, 1819, was duly assigned by Coit to the defendant Ford. This assignment was also duly recorded. On September 27, 1814, French mortgaged the same lands to one Gaius Pease, to secure the payment of a note of the same date, for the sum of nine hundred and ninety-seven dollars and twenty-nine cents, payable in one year. This mortgage was recorded September 29, 1814; but there was *no seal* attached to the certificate of acknowledgment by the justice of the peace. On November 11, 1814, Pease assigned his mortgage to Phelps, of which assignment French had notice, and on January 20, 1816, paid Phelps upon the mortgage four hundred and fifty dollars. On November 16, 1818, French conveyed the lands in controversy, with general warranty, to Ford; the deed was recorded on December 18, 1818, and was absolute in its terms, but intended merely as security for advances made by Ford. On March 19, 1827, French gave Ford a quitclaim deed for the same premises, under which Ford took possession, French having always occupied previous to that time. Phelps died on July 1, 1826. The complainant prayed that the mortgaged premises might be sold, subject to Coit's mortgage, and the proceeds applied to the payment of the mortgage assigned by Pease to Phelps.

The defendant, Ford, answered, and denied all knowledge of the

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note and supposed mortgage given by French to Pease, but admitted that after the deed to himself, of November 16, 1818, he had heard of said supposed mortgage, but insisted *that it could [319 not operate as notice, in consequence of the want of a seal to the acknowledgment. He also denied all notice of the supposed mortgage at the time he took the assignment of Coit's mortgage. He further alleged, that on November 16, 1818, he purchased the premises of French for the sum of four thousand five hundred dollars, and was at that time entirely ignorant of any mortgage on the same, except Coit's mortgage; that Phelps had full knowledge of this purchase, and the payment of the consideration money; that this defendant and French applied to Phelps to draw the deed, who did so; and was not only silent as to any claim he might have on the land, but told defendant that there was no mortgage or other lien on the same, except Coit's mortgage. This defendant neither admitted nor denied that the deed of November 16, 1818, was intended to secure advances made by him to French.

The defendant, French, admitted all the material allegations in the bill, and stated further, that at or just before the time of the execution of the deed of November 16, 1818, he gave Ford notice of the mortgage to Pease, and also stated that the deed was intended only as security for advances, and that Ford gave him an instrument of writing to that effect.

It appeared from the exhibits and testimony, that the note given by French to Pease for nine hundred and ninety-seven dollars and twenty-nine cents, was assigned by Pease to Phelps, by an indorsement on the back of the note; but there was no actual assignment of the mortgage, which was given to secure the note. It was admitted that the deed of November 16, 1818, was drawn by Phelps, and in his own handwriting. It was also in proof, that some time in the spring, or in the month of June, 1826, Phelps told the witness that he had advised Ford to give French further time to pay his debt, and assigned as a reason that Ford had a clear title to the farm, or that there was no claim on the land except Ford's; and that there was an agreement between French and Ford, giving further time to pay, which was written by Phelps, but was afterward canceled.

*PHELPS, for the complainant.

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WEBB, for defendants.

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By the Court:

1. It seems to be settled law, that an assignment of a note in writing, and delivery of the mortgaged deed, transfers all the rights secured by the mortgage. 1 Johns. 580; 3 Johns. Cas. 322; 2 Sw. Dig. 110; 4 Johns. 41; 1 Gallison, 155; 1 Ohio, 320.

2. Is the mortgage to Pease defective, for want of a seal to the acknowledgment of the justice of the peace? No seal, or other ceremony, in the acknowledgment of deeds, executed by a *man*, or by an *unmarried woman*, was required by any law of this state, until the statute of 1819. Vol. xvi. 192. The law adopted from Pennsylvania, in 1795, required that all deeds executed by *husband and wife* should be acknowledged in a certain manner, and such acknowledgment should be certified, upon the deed, under the hand and seal of the judge, or justice of the peace.

This distinction between deeds executed by husband and wife, and other deeds, was maintained in the statutes of 1802 and 1805, and it was not till 1818 that the distinction was annulled, and a seal required to the acknowledgment of all deeds.

The seal, and other ceremonies, in the acknowledgment of deeds by husband and wife, were doubtless intended to protect the rights of married women; and were originally introduced into our law to supply the place of the common law formalities, in the conveyance of real estate by *femes covert*.

The mortgage in question having been executed in 1814, by French alone, no seal was required to the acknowledgment; it was, therefore, well recorded, and conveyed notice to Ford.

3. The mortgage having been duly recorded, Ford's subsequent purchase, was necessarily subject to the rights of the mortgagee, or his assignee, unless there was such a fraudulent suppression of 321] the truth, or suggestion of falsehood, by *Phelps, as to authorize a court of equity to postpone or annul his mortgage. If, at the time of Ford's advancement or purchase, Phelps denied, or stood by, and when questioned, concealed his own title, he practiced a fraud, and has no right against Ford. 4 Johns. Ch. 65.

Ford, in his answer, alleges that Phelps drew up the deed, and was not only silent as to his own claim, but asserted that there was no mortgage or other lien on the land, except Coit's mortgage. This allegation is not responsive to any charge contained in the bill, but is new and distinct matter, set up in the answer, to avoid a pre-existing right in Phelps, and must therefore be proved. 2

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Johns. Ch. 62; 2 Vesey, 587; 1 Johns. 580. It is agreed between the parties, that Phelps drew up the deed from French to Ford; but this circumstance neither proves nor disproves the charge of fraud. It is not sufficient to postpone a prior mortgage, that the mortgagee assisted in the execution of a second mortgage; but it must appear affirmatively, that the first mortgagee denied or fraudulently concealed his title. The mortgage of Phelps being duly recorded, was notice to all the world, and the fact that he acted as a scrivener in drafting a subsequent mortgage, can not, *per se*, operate as a forfeiture of his rights. There is no evidence that Phelps, at the time, either concealed his title or denied its existence.

The only testimony in the cause is the deposition of the younger Ford, and that refers exclusively to a transaction in 1826, a few days before the death of Phelps, and nearly eight years after Ford's purchase or advancement. This testimony, taken in its strongest sense, amounts to no more than an admission by Phelps that the mortgage money had been paid. But Ford, by his pleadings, does not rest his rights upon this ground. He does not pretend, in his answer, that the mortgage was paid in 1826, or at any other time, but insists that Phelps shall be postponed, by reason of the alleged fraud practiced in 1818. His proof does not correspond with, or support his allegations. A defendant can not set up one defense in his answer, and upon the final hearing rely upon another. His allegations and his proofs must correspond.

Decree for complainant.

*Judge BRUSH dissented:

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The testator in his lifetime, to wit: November 11, 1814, obtained from Gaius Pease, the assignment to him of a note of hand for nine hundred and ninety-seven dollars and twenty-nine cents, payable one year from date, and dated September 27, 1814, made by defendant, Jacob French, to said Pease. January 20, 1816, said French paid testator four hundred and fifty dollars; the receipt of which was indorsed on the note, as a credit or receipt of so much that day on the note. To secure the payment of that note, defendant French had given to said Pease a mortgage on three hundred and two acres of land, lying in Geauga county, bearing date, and no doubt executed and delivered on the same day of the note, September 27, 1814. It is said in the bill, and admitted in French's answer, that this mortgage was assigned and transferred by Pease to the testator,

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by the assignment of said note. There is nothing in the note, or assignment thereon, which refers to the mortgage in any way; nor is there any assignment or transfer in writing, of said mortgage, by Pease to testator. French, before the execution and delivery of the above mortgage by him to said Pease, had given a mortgage for the same land to Daniel L. Coit, bearing date June 8, 1813, to secure the payment of five hundred and six dollars. This last mortgage was sold and transferred, by assignment in writing, May, 1819, by Coit's agent, Perkins, to defendant Ford. Before that time, to wit: November 16, 1818, defendant French sold and conveyed to Ford the same land, for the consideration of four thousand five hundred dollars. This deed was written for the parties by the testator, Phelps; that is, a printed blank deed was filled up by him, at the request of the parties thereto, said French and his wife, of the first part, and defendant Ford, of the second part.

The bill states, and the defendant, French, admits, that he gave to Ford a quitclaim deed for the same land, March, 1827. Defendant, Ford, says nothing about this quitclaim deed, in his answer, probably because he considered it unimportant in the controversy, as it undoubtedly is.

323] *Phelps, the testator, died in 1826. His administrator, with the will annexed to his administration, now brings this bill setting forth the above conveyances and incumbrances upon said farm and tract of land, and insists on the right of his testator and his right, as personal representative, to have the premises sold to pay him as such administrator the balance due on said note, after satisfying the prior incumbrance, created by the mortgage to Coit, now belonging to defendant Ford; and that after deducting the said sum of four hundred and fifty dollars, paid and indorsed on the said note, the balance thereof is due.

The above deeds were all duly recorded in Geauga county, and each of them is still entitled to preference, according to its date, unless the defendant, Ford, has alleged in his answer, and proved sufficient to postpone and bar the mesne incumbrance to Pease, of 1814, which intervenes between the Coit mortgage of 1813 and Ford's deed of 1818; and the plaintiff will be entitled to the relief he seeks if he has sufficiently shown his right to the mortgage from the defendant, French, to Pease, and has the proper parties before the court to enable them to decree.

Ford's answer denies explicitly more than once all knowledge

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(that is, all actual knowledge) of the existence of the mortgage and note from French to Pease at the time he received the deed from French to him, and paid for the land the consideration therein expressed. He states, in his answer, that testator Phelps had full knowledge of the purchase by him from French and the consideration; and that he, Phelps, was applied to by both to draw the deed, and did draw it; that it is in his handwriting, and that he, Phelps, then told him, Ford, that there was not any mortgage, claim, or lien on the land except his, Ford's, and charges the fraud of concealing the mortgage to Pease, etc.

Plaintiff's counsel admit, in writing, that the deed from French to Ford, dated November 16, 1818, is in the handwriting of Phelps, except the printed part, the signatures of the grantors, and witnesses. The deposition of Seabury Ford, defendant's son, proves the confession of Phelps, made in 1826, that he "had advised defendant, Ford, to give time of payment to French for his debt, assigning as a reason *that he, Ford, had a clear title [324 to the farm, or that there was no claim on the land except his, or similar words conveying the same idea; and it being so clear was a sufficient security for the debt." In answer to a question by counsel, "If Phelps told the time he had this conversation, and gave this advice," witness answers: "I do not recollect that he did, but I suppose that it was a few months before, as an agreement was made between said French and Ford, giving further time to pay; and said agreement was written by Samuel W. Phelps, but was afterward taken up and canceled."

The bill states that Phelps died July 1, 1826. Defendant Ford could not, therefore, by interrogations in his answer, call for any confession of the matters stated by him. There is not, and consequently could not be, any denial of those allegations. Yet the plaintiff must prove them, but is not bound to the extraordinary proof of two witnesses, as in case of a denial by a party under oath, or of one witness with circumstances corroborating his testimony.

The ground of defense, upon the merits in this case, is that if Phelps was the real owner of the mortgage from French to Pease, he fraudulently concealed from defendant Ford the knowledge of the fact, or that any such claim rested upon the estate in controversy at the time when it was important for him, Ford, to know it, and when he, Phelps, was bound in conscience to disclose.

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I know of no legal reason why I may discredit the witness, Seabury Ford, although he is the son of defendant, for whom he testifies. There is no denial of the matters he has related, or evidence against his character. His evidence harmonizes, in every respect, with the uniform conduct of the testator, sustaining the honesty and fairness of that conduct, which, otherwise, it would be impossible to reconcile with integrity and honor.

Are we not bound to believe that a witness, uncontradicted, tells the truth when he proves the adversary party honest, rather than presume the contrary without any proof? There is no evidence that Phelps ever claimed the mortgage of Pease as a security for the note assigned to him; he might, therefore, well say there was no other lien upon the land but Ford's, and persuade Ford to give \$25] time of payment, *and write for the parties an instrument stipulating such extended credit, which, in this instance, had the effect in law to convert the absolute deed into a mortgage. The witness was not informed by Phelps, when he gave the advice, to give time of payment. What, then, is our duty but to infer that the time was when the act done would have the effect intended, and which the witness says it had? The object and purpose of the statement of Phelps, and his advice to Ford, was to procure time of payment for French. The motive of Phelps may be altogether immaterial, but it is difficult to imagine any other than a favor to French, or to advance his own interest, or both. The latter might be effectually accomplished by the delay, which might enable French, in the meantime, to raise the money to pay off Phelps' debt, if he owed him any at that time on that note, or on any other account. Whatever the motive or object, the effect of those statements and advice was to change the nature of the title which Ford had to the land, from an absolute to a conditional fee, extending the equity of redemption to French a considerable length of time, and thereby enlarging his rights. This, in law, happen when it would, is sufficient to postpone and bar the lien of him who procures this to be done by denying his own title, if he has any at the time, and persuading thereby his adversary to change his. And more so, if this was done (and I feel warranted, from the evidence and all the circumstances of the case, to find it was) at the time when the absolute deed was made. It seems to me there is better reason to believe it was done at that time than any other. That it was *done* there is no reason to doubt, unless

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there be good reason to discredit the witness. As I understand the case, the actions of the parties, and the circumstances of the entire transaction, corroborate the witness in every particular, so far as he undertakes to speak with any certainty. The testator acquired his right to that lien, if at all, when the note was assigned to him, and by that act—that was 1814. A payment was made to him in 1816 of four hundred and fifty dollars. Is it not remarkable he did not assert his right to this security and coerce payment of this debt during his life, if he had the right, and the debt subsisted from 1814 or 1816 until 1826? In the meantime deny his own right and assure his *neighbor *his* was perfect! I can not [326 overcome the reluctance I feel to set it up at this late day.

A sleeping mortgage, denied during all the life of the testator, to be set up after his death by his personal representative, and that with such a doubtful title to it, as here is manifested. It may sleep on for me. I can not lend my aid to give it force to take from that neighbor his estate, clear of every other embarrassment, and clear of this, if any faith may be given to the assurances of this testator, in his life and in his actions, neither of which in this respect did he ever contradict. It is due to his memory to believe, as he declared, that no such claim existed on the land. I should also be prepared to say, that as he acted as the agent of French and Ford, in preparing the deed from French and wife to Ford, being the scrivener, it would be fraudulent in him, if alive, to set up any claim to an incumbrance which he then held on the land, and forbore to disclose to Ford, who was giving a full consideration for it. Within the meaning of Chancellor Kent, in *Brinkerhoff and others v. Lansing*, 4 Johns. Ch. 70-72, I consider this employment of the testator to prepare for the parties the conveyances as equivalent to "*asking information*," and his "*silence deceptive*," if indeed he could claim any title vested in himself, at that time, of the same land thus about to be exchanged by French for so great a price.

For him to insist on his title, under such circumstances, if not technically "*active fraud*," within the chancellor's meaning, it seems to me he would say it was most wickedly *inactive deception*, and treacherous; against good faith, and pernicious in its consequences. In its features and circumstances there is really no analogy between that case and the present. It introduced the subject of this fraud (by concealment of title when others were dealing),

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but made no case for relief. And the chancellor, in discoursing upon it, ran it down so eloquently that there would be room to question the precision or accuracy of his language as to this *active fraud*, there considered necessary in all cases, if it could be made applicable to this case and its circumstances. On the whole, it is my opinion, that the bill ought to be dismissed; and, at any rate, 327] that no decree can be made for plaintiff *until Gaius Pease be made a party. *Mallow v. Hinde*, 12 Wheat. 193, 196; 9 Cranch, 25; 1 Peters, 243.

TIMOTHY BUELL v. LUCIUS CROSS.

Where a party has remedy at law, in the prosecution of which he has been defeated by an erroneous decision, he can not be aided in equity.

THIS was a suit in chancery, and reserved for decision by the Supreme Court in Washington county.

The bill stated, that some time previous to May 14, 1817, the plaintiff was treasurer of a certain company or association, existing in Washington county, and known by the name of the Duck Creek Bridge Company, which company, before that time, and under an act of the legislature of Ohio, had erected, at a great expense, a bridge across Duck creek, and had been accustomed to receive tolls, authorized by said act. That on May 14, 1817, one William Hart and the plaintiff, as treasurer of said company, entered into an agreement by which Hart rented said bridge for the term of one year, for the sum of three hundred and thirty-seven dollars, to be paid quarterly. That to secure the payment of the rent, Hart executed to the plaintiff, as such treasurer, a joint bond with Obadiah Lincoln, Philip Abbott, and Timothy Stanley, as securities. That no part of said rent has ever been paid by Hart, or any of his securities. That Timothy Stanley died some time in March, 1819, leaving a will, and Abigail Stanley his executrix, who made probate of the will. That on April 15, 1819, the plaintiff commenced a joint action of debt on said bond, against Hart, Lincoln, Abbot, and Abigail Stanley, as executrix of Timothy Stanley, and in July, 1819, a judgment, was rendered by default, against all the defendants, for the sum of five hundred dollars, the whole

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penalty of the bond—no breaches having been assigned. That after the rendition of said judgment, and before March 24, 1825, Abigail Stanley died, and the administration of her estate, as well as that of Timothy Stanley, not fully administered upon, was committed to the *defendant, Lucius Cross. On March 24, [328] 1825, the plaintiff issued a *scire facias* to revive said judgment against Cross, as administrator *de bonis non* of Timothy Stanley, upon which Cross appeared, and on demurrer, a judgment was rendered against the plaintiff, in June, 1825. Since the rendition of the original judgment, Lincoln has died wholly insolvent, Hart and Abbott are both insolvent; and at no time since the rendition of the original judgment, could anything have been collected from Hart, Abbott, or Lincoln. Executions against them were returned, no property found.

The prayer was, that Cross be decreed to pay the said sum of three hundred and thirty-seven dollars, with interest, to the plaintiff, as treasurer of the Duck Creek Bridge Company, and for general relief.

The defendant demurred generally.

NYE, in support of the demurrer, contended:

First. That as against the defendant, the complainant has no equity to be enforced; for that the obligation, on which it is sought to charge the estate which he represents, having been joint only, it was extinguished at law, as to Stanley, by his death; and equity will not give it new life against his representative, he having been a mere surety, liable only by the legal obligation raised by the bond itself, and not by reason of any debt due from him, or benefit accrued to him in the transaction, from which an independent, moral, or conscientious obligation, might have risen or existed. 2 Johns. Ch. 1; 2 Evans' Pothier, 58; 1 Bro. Ch. 27; 2 Wash. 136; 2 Hen. & Munf. 124; 3 Ves. Jr. 399; 2 Johns. Ch. 585, 630, 651; 2 Atk. 31; 2 Ves. 101, 371; 1 Caine's Cas. Err.; 3 Ohio, 33; 1 Fonbl. 161, 162; 4 Desaus. 148.

Second. Whatever might have been the state of the question, anterior to the decision upon the *scire facias*, the complainant having brought his claim to a determination in that mode before a competent tribunal, is concluded by that determination.

*GODDARD, contra:

The authority, from 2 Wash. 136, is admitted to be in point for

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the defendant, but it is believed that no similar case can be found to sustain it. 4 Desaus. 148, is directly the other way. These two American authorities are directly opposed to each other, and are the only cases found upon this subject. There seem to be sound reasons why the South Carolina decision should be adopted rather than the Virginia.

It is true that the case in 2 Ves. 101, is liable to the exception stated in Washington, viz: that there was a binding to both obligors. But this circumstance should not impair the weight of the authority, unless the chancellor limits his decree to the amount actually received by the testator, and no such limitation appears.

It is clear that if upon the death of one obligor in a joint bond, the obligee can not compel any payment from the executors (the other and surviving obligors being insolvent), neither can one obligor who pays the whole debt, look to the executors of a deceased obligor for contribution. The whole doctrine rests upon the supposition, that where the bond is executed, the parties agree to take their chance of survivorship. This court has brushed away all the law on that subject relating to real estate. The present objection may as well share the same fate.

The consequences resulting from a decision in favor of the defendant may be serious. Sheriffs and coroners, justices of the peace, county auditors, administrators, guardians, and parties appealing from the court of common pleas to this court, are required by statute to give bonds, with two or more securities. In all these cases, and numerous others, a *joint* bond will satisfy the requisitions of the law, and no doubt such has been taken. Are the court prepared to sanction a doctrine, which may render these bonds useless, or which may subject one surety to the entire loss, without a contribution from the estate of his co-security, who has luckily died first? Is not all discussion upon this point unnecessary, in a 330] case like the present, where the parties to *the bond *expressly* bind themselves, their *executors*, and *administrators*?

Several other points were argued by the counsel, upon which the court intimated no opinion.

By the Court:

The plaintiff, by his own showing, has a judgment now subsisting against the executrix of Stanley, and no good reason is assigned why that judgment does not embrace his rights. The doc-

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trine, recognized by this court, in 3 Ohio, 305, is applicable to this case: that however summary, or however irregular, the judgment of a competent tribunal can not be treated as a nullity. There is an explicit and formal judgment, and although the proceedings upon which it was predicated, may be unknown to our jurisprudence, still, as in all other judgments, they are not open for inquiry, except in a regular mode of re-investigation, on writ of error or *certiorari*. The remedy of the plaintiff is purely at law; this remedy he has attempted by the *scire facias*. If he properly failed, his rights are at an end; if improperly, his remedy was by error or appeal.

A person having an option of law or equity, after selecting one tribunal, can not resort to the other. 1 Ohio, 435; 2 Ohio, 268; 3 Johns. Ch. 356.

It is unnecessary to determine the question argued by counsel, whether, when the legal remedy against a surety is extinct, a court of equity will enforce the obligation. This court would hesitate, before they adopted the doctrines contained in the cases cited from 2 Wash. 136; 2 Hen. & Munf. 124.

Bill dismissed.

*JACOB KERNS v. NICHOLAS SCHOONMAKER.

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Statute of limitations commences to run so soon as the injurious act complained of is perpetrated, although the actual injury is subsequent, and could not immediately operate.

THIS cause was reserved for decision by the Supreme Court in Hamilton county.

It was an action on the case to recover damages of the defendant, for negligence and omission of duty, as *justice of the peace*.

The declaration alleged, that on April 25, 1825, one John Stewart voluntarily confessed a judgment, in favor of the plaintiff, Jacob Kerns, before the defendant, as a justice of the peace, for the sum of one hundred and seventy-two dollars and sixty-nine cents. On April 28, 1825, Stewart offered one Simon Elliot, as security, for the stay of execution upon this judgment, who was accepted by the defendant; but the entry upon his docket was ac-

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carelessly, negligently, and informally made, that Elliot was not legally bound thereby. Stewart died, insolvent, before the supposed stay of execution expired. The plaintiff prosecuted Elliot upon the informal recognizance, taken by the defendant, and such proceedings were thereupon had, that this court pronounced the supposed recognizance absolutely void; and Elliot was discharged. The plaintiff claimed the amount of the judgment, with interest, and also his costs and expenses in prosecuting Elliot.

The defendant plead, first, *not guilty*. Second, *not guilty*, within one year next before the commencement of this suit.

The plaintiff joined issue upon the first plea. To the second, he replied specially, that on January 26, 1828, he brought an action of debt against Elliot, upon the supposed recognizance, in the court of common pleas of Hamilton county, in which a judgment was rendered against the plaintiff, at November term, 1828. The plaintiff appealed to this court, and at May term, 1829, this court gave judgment against the plaintiff, upon the ground that the supposed recognizance was altogether void; which judgments are unreversed. The plaintiff further alleged that this suit was brought within one year after his rights were made known by the decision of this court, at the May term, 1829. This suit was commenced on December 12, 1829.

332] *To this replication there was a general demurrer and joinder. The court below sustained the demurrer, and gave judgment for the defendant, from which the plaintiff appealed to this court.

There was no argument in support of the demurrer.

CASWELL and STARR, contra :

The only question presented upon the pleadings is, when did the cause of action accrue? When the defendant *took* the security in 1825, or when Elliot *avoided* it in May, 1829? The cause of action can not be said to accrue until an injury is sustained. It was no injury to the plaintiff for the defendant to take the security in the form he did, unless Elliot took advantage of the defect.

Instead of pleading, *not guilty* within one year, the defendant should have plead, that the cause of action did not accrue within one year. 4 Bacon, 474. Hence it was necessary to set forth, by way of replication, facts showing when the cause of action did accrue.

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If the plaintiff had sued the defendant soon after the security was taken, he would have recovered only nominal damages. He could not then have set forth the nature and extent of the injury.

The principle seems to be settled in 12 Mass. 127; where it is laid down, that it would be an unreasonable construction of the statute, to say that the time of limitation began to run before the plaintiff could set forth, in his declaration, the extent of his injury

By the COURT:

The plaintiff insists that his right of action did not accrue until the termination of the suit in this court, in 1829; and unless he can sustain this position, he is too late in his action. For if the action accrued when the mistake was made, or when the supposed stay of execution expired, or when the suit was instituted against Elliot, more than one year had elapsed before the commencement of this suit.

It is unnecessary to determine the precise moment when the *statute did attach, for we entertain the opinion that no [333 later period can be selected than the institution of the suit against Elliot. Admitting that the plaintiff might reasonably expect Elliot to fulfill his supposed recognizance, and pay the debt, yet, when he evinced his intention not to be bound, the plaintiff's remedy against the justice was complete.

It is, however, objected that only nominal damages could have been recovered, previous to the determination of the suit against Elliot. This objection seems to be removed, and, indeed, the whole case disposed of, by the decision of the Supreme Court of the United States, in the case of Wilcox et al. v. Plummer, 4 Peters, 172. It was a suit brought against an attorney for negligence. The plaintiffs placed a note in the hands of Plummer for collection. On May 7, 1820, he commenced a suit against the drawer, but neglected to do so against the indorser. The drawer proved insolvent. On February 8, 1821, Plummer sued the indorser; but in consequence of a misnomer, the plaintiffs were nonsuited in June, 1824. Before the nonsuit, the action against the indorser was barred by the statute of limitations. The suit against the attorney was instituted on January 27, 1825, to which was pleaded the statute of limitations of North Carolina, which interposes a bar after three years. Mr. Justice Johnson, in delivering the opinion of the

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court, uses this language: "When the attorney was chargeable with negligence, his contract was violated, and the action might have been sustained immediately. Perhaps in that event, no more than nominal damages may be proved, and no more recovered; but, on the other hand, it is perfectly clear, that the proof of actual damage may extend to facts that occur and grow out of the injury, even up to the day of the verdict. If so, it is clear the *damage* is not the cause of action. This is fully illustrated by the case from 1 Salk. 11, in which a plaintiff having previously recovered for an assault, afterward sought indemnity for a very serious effect of the assault, which could not have been anticipated, and, of consequence, could not have been compensated, in making up the verdict."

The cases are numerous and conclusive on this doctrine. As 334] long ago as 20 Eliz., 1 Cro. 53, this was one of the points *ruled in the *Sheriffs v. Bradshaw*. And the case was a strong one, for it was altogether problematical whether the plaintiffs ever should sustain any damages from the injury. The principle has often been applied to the very plea here set up, and in some very modern cases. That of *Baltley v. Faulkner*, 3 C. & A. 288, was exactly this case; for there the damage depended upon the issue of another suit, and could not be assessed by a jury until the final result of that suit was definitely known. Yet it was held that the plaintiff should have instituted his action, and he was barred for not doing so. In *Howell v. Young*, 5 B. & C. 254, the same doctrine is affirmed, and the statute held to run from the time of the injury, that being the cause of action, and not from the time of damage or discovery of the injury. (a)

Demurrer sustained.

(a) The recognizance taken by the justice was as follows:

Jacob Kerns	}	Recognizance bail, 25.
vs.		Simon Elliot appears, and acknowledges him-
John Stewart,		self bail in the above case.

SYLVESTER P. BABCOCK v. THOMAS P. MAY AND OTHERS.

Parol evidence is not admissible to prove a contract to freight different from that expressed in the bill of lading.

THIS was an action of assumpsit, brought against the defendants, as owners of the schooner *America*, to recover the value of two hundred and five barrels of salt, shipped on board the *America*, at Buffalo, in the State of New York, to be delivered at Cleveland, in the State of Ohio, and which was lost upon Lake Erie.

Upon the trial, before the Supreme Court, in the county of Cuyahoga, the plaintiff offered in evidence the following bill of lading:

"No. 197. Shipped in good order, and well conditioned, by S. Thompson & Co., on board the schooner called the *America*, whereof is master, for this present voyage, Z. Brown, now lying in the port of Buffalo, and bound for Cleveland, Ohio. *To say: [335

"For Merwin Giddings & Co., 113 barrels, containing, 120 50-280 barrels salt by weight; S. P. Babcock, 192 barrels, containing 205. barrels salt by weight. Shipping charges, \$8.20. Charged M. G. & Co.; S. S. & Co., per Taylor. Being marked and numbered as in the margin, and are to be delivered in the like good order, and well-conditioned, at the aforesaid port of Cleveland, the danger of the lakes and rivers only excepted, unto Merwin Giddings & Co., they paying freight for the said salt at two-eighths per barrel, when delivered at their warehouses. In witness whereof the master of the said vessel hath affirmed to one bill of lading, all of this tenor and date, the one of which bills being accomplished, the other to stand void. Dated in Buffalo, October 21, 1827.

"ZADOC BROWN."

It also appeared that the *America*, being heavily laded, deviated from the usual and direct course from Buffalo to Cleveland, for the purpose of going to the port of Otter Creek, in Upper Canada, and during the voyage the salt was unavoidably lost, on the Canadian coast, in a storm.

The defendants then offered in evidence the *manifest*, duly proved by the collector of the port at Buffalo, by which it appeared that the *America* was authorized to proceed to Cleveland, via Otter

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Creek; and also the depositions of certain persons, by which it appeared that John L. Kimberly, of the firm of S. Thompson & Co., who acted as shipping and forwarding merchant for the plaintiff, in the shipment of the salt, verbally agreed that the master of the schooner might go to Cleveland by the way of Otter creek, and that the master refused to take the salt on board the schooner upon any other terms. To this testimony the plaintiff objected, and the 336] court sustained the objection. A verdict was found for the plaintiff, and a motion for a new trial was made by the defendants, which motion was reserved for the decision of this court.

CASE, in favor of the motion:

The defendant contends that the court erred in rejecting the defendants' depositions, offered to prove the understanding and agreement of the shipper, that the vessel should touch at Otter creek.

A bill of lading is in its nature a mere receipt (is so called, 2 Starkie Ev. 331), and no reason is perceived why a receipt, acknowledging the receipt of goods or salt should be distinguished from other receipts. A receipt may be explained, superseded, and even contradicted, by parol evidence. It is only *prima facie* evidence. 3 Starkie, 1272, 1276, and cases cited; 3 Esp. 214; 2 Johns. 378; 3 Johns. 319; 5 Johns. 68; 2 Term, 866, etc.

Considering the bill of lading as the contract in writing, the defendants' evidence, offered and rejected, does neither vary, contradict, nor impeach it, and ought to have been received. The writing on the bill is to carry from Buffalo to Cleveland; nothing is said therein whether the carrying is to be by way of Otter creek, Erie, or straight through the lake. If it be presumed the carrying shall be straight through the lake—it is admitted such may be the *prima facie* presumption—but that presumption may be rebutted. One way in which the court, in this case, permitted the presumption to be rebutted was, by showing that it was usual and customary to deviate and stop at intermediate ports. Such evidence could only have been admitted upon the principle that the contract in the bill of lading was not, and is not *conclusive*, so as to govern the course of the carrying. Then why may not the presumption of a straight course as well be rebutted by express evidence of the agreement of the party, or his agent, that a particular course shall be pursued in carrying, as by showing custom to de-

viate and stop at intermediate ports. Such evidence, in either case, no way interferes with the agreement for carrying from Buffalo to Cleveland; it is only regulating an indifferent matter, whether *the carrying shall be done by way of A. or B., both [337 leading to the contracted point. 3 Starkie, 1234, and onward, 1241, 1037, 1040.

The bill of lading, in this case, is not made as is usual. Compare it with Abbott on Ship. 217. The regular bill of lading, on its face, purports to be a contract between the shipper, the real owner of the property, and the carrier, and to deliver to the consignee. And the action is, in such case, in the name of the shipper or consignee, whichever is owner, against the carrier. In the present case, S. T. & Co. are the shippers, Merwin, Geddings & Co. consignees. The action is not in the name of either—it is not founded on the written contract. That bill contains property owned by two distinct sets of persons. No action can ever be sustained by Babcock upon it, or by means of it, otherwise than by introducing parol evidence to explain it. The contract appears to be between S. Thompson & Co., and the carrier, by Brown, the master; and it was alone by introducing parol evidence to show Babcock an owner of the salt that he could sustain the action. The contract in the bill was incidental evidence, I admit, to prove the agreement to carry, upon the principle that the bill was only incidental and *prima facie* evidence, to be controlled or explained by other testimony. But if the bill is conclusive, and not to be questioned, explained, added to, nor diminished, the court ought now to grant a new trial for having suffered other evidence of ownership to go to the jury.

As the suit is brought, it is not between those who, strictly speaking, are parties to the contract in the bill. The bill can not estop either party from producing other evidence relative to the subject matter. Upon the whole, it appears to me that the bills of lading on the lake are considered as mere memorandums of property received and to be carried, to what place, and to whom to be delivered; and are every day explained in practice. No action in this case can be sustained by Babcock without parol evidence to prove his ownership. It has been admitted for him. Parol evidence has also been admitted to show that vessels, by custom, may, and do deviate from a straight course. And without which every carrier on the lake would be liable if a loss happened.

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338] *If, under all these circumstances, evidence of an express agreement, by the shipper, to touch at a particular point in the route can not be given, it is at least a particular case, and circumstanced a little extraordinary. 3 Starkie, Parol Evidence, 3, 1034, and onward.

WILLEY and STIRLING, contra :

1. Is it competent for the defendant to contradict the *bill of lading* by parol ; if so, to what extent ?

2. Are the declarations made by *forwarding merchants*, having no interest in, nor authority over the property, except to *forward* it, admissible and conclusive upon the owner, the plaintiff ?

1. It is a well *settled* principle, that *parol evidence* can not be admitted to contradict, vary, alter, or explain a written contract, that all conversations *before* and *at* the time of making the *written contract* are merged.

Is a *bill of lading*, or a *written memorandum* to transport from one given place to another, upon certain conditions, and for a certain compensation, certain articles of property, as in said memorandum expressed, then a *contract* ?

A *contract* is defined by the *common law* to be "an agreement upon sufficient consideration to do, or not to do, a particular thing."

2 Bl. Com. 442. Here, then, is an agreement by defendant to deliver the articles acknowledged to have been received (or shipped by plaintiff) upon *consideration* of plaintiff paying a specified compensation, and this in writing.

Lord Loughborough says, "*a bill of lading* is the written evidence of a *contract* for the carriage and delivery of goods sent by sea for a certain freight." 1 H. Bla. Ch. 359.

A *bill of lading* is negotiable ; and in the hands of an assignee, the acknowledgment of the *receipt of freight* is *conclusive* upon the party. 5 Term, 683 ; 6 Mass. 425.

It is expressly treated as a *contract* by all the authorities. Abbott, 132-246, top paging.

If, then, a *contract*, why should *parol evidence* be admitted to contradict, etc., its terms ? Is a *written contract* to build a house, to labor, to convey, and to do any other act, of a more solemn or
339] important nature than one to *transport* property upon *the water* ? If not, why should a different principle be applied to the one from which is applied to the other ?

But it is said to resemble a *receipt*, and can therefore be contradicted. It is not denied but that a *receipt* for money may be explained, or that it is not *conclusive* upon the party. So says 3 Starkie, 1044—and so is the law. But this no more proves that a *bill of lading* may be contradicted, than that a deed, or any other *instrument* or *contract* in *writing*, in which there is an acknowledgment of a receipt of money, can be, by *parol*. And if a receipt for money may be explained, no reason can be urged why a *receipt of goods* can not be; that is, so far as relates to the *receipt* or *receiving* of the goods, only that no adjudged case is to be found warranting it. But what is meant by “a receipt of money may be explained?” It is, that *this fact* may be controverted by *parol*; and the doctrine applies equally to deeds and instruments of the most solemn nature.

Thus, “upon failure of an annuity deed—upon an action brought by the plaintiff against the two grantors, to recover the consideration paid—one of the defendants, who was a surety only, was permitted to show, notwithstanding his having signed a receipt for the money, jointly with the other defendant, the principal, that he had never in fact received the money.” Stratton v. Rastall and others, 2 Term, 356. But *vide* 2 Taunton, 141, Com.

But it will not be claimed that the *terms, covenants, and conditions* of such a deed can be *explained* or *contradicted* by *parol*; but why not, upon the principle contended for by the defendant? A deed is as much a receipt, as a bill of lading. It is the *receipt* of the money, in a deed, which forms the consideration for the *covenants*, etc. So the *receipt of property* in a *bill of lading*, and the freight to be paid on account of that property, which forms the consideration of the promises, etc., of the master or *ship owner*—and perhaps in analogy to the foregoing case from Term Reports, the defendant, in this case, might introduce *parol evidence* to show that actually *no salt* was ever received; and thereby contradict the *receipt*. But no adjudged case to be found, warrants such a procedure. And in McKinny v. Pearsall, 3 Johns. 318, the court admit *parol evidence* in relation to a *receipt of property*, solely upon the *ground [340 that it was *consistent* with it, and not *contradictory*. Spencer, J., in delivering the opinion of the court, says: “If the *receipt* had been in terms more explicit than it is, it would be open to explanation. I mean *that kind of explanation not directly contradictory to, but consistent with it.*”

The cases referred to by the defendants' counsel, and all the

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cases in the *books* upon this point, establish the *simple fact* that parol evidence is admissible to show whether money, or *no* money, or what *amount* was received; but not that this species of evidence is admissible to explain, or contradict every other part of an instrument, in which may be contained a *receipt of money or other property*; and the same arguments that can be drawn from this source to contradict or explain, by parol, *every part of a bill of lading*, may be used to contradict or explain a deed, or any other *written instrument* whatever.

A deed, or even a record, which is *conclusive* upon the *parties*, is not always *conclusive* upon *all points*. Thus, evidence is admissible to prove a *deed* was executed, or a *bill of exchange* made, at a time different from the *date*. Hall v. Casenon, 4 East, 477.

And *records* which are conclusive, as far as regards their *substance*, *avorments*, and *proofs*, may be received to contradict them, as to *time* and *place*, and many other *particulars*. 1 Pick. 362; 5 Day, 160.

A *bill of lading* is a contract of as high a nature, and of as much importance as any other species of contract whatever; and the interests of the community, and its safety and welfare, require that *every guard* should be thrown around them which is consistent with *precedent*, and that they should not be exposed to the avarice, cupidity, and dishonesty of a class of men who have always the *means* about them of defeating the most *honest* claims, provided their solemnity and stability are destroyed, by suffering them to be contradicted or explained by *parol*.

Lord Ellenborough says: "I can recognize no property *but* that recognized by the *bill of lading*." 2 Camp. 38.

In Barber v. Bran, etc., *this precise point* is decided by the unanimous opinion of the court; and it is the only case to be found **341]** where the question is raised or decided in relation to **a bill of lading*. The *marginal note* is: "When the master of a vessel, receiving goods on board for transportation, gave to the *shipper* a *writing*, acknowledging the *receipt* of the *goods*, and stating that they were to be transported to the place of destination at customary freight, dangers of the seas excepted; it was held, that a *parol agreement* between the *shipper* and *master*, before and at the time of giving the writing, as to the mode of stowing the goods, was inadmissible to show the *terms* of the *shipment*, as all such communications between the parties are to be considered as *merged* in the *writing*. The *bill of lading* was in these words:

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"Received on board the sloop *Mary* eight hogsheads of gin, of *Horace Barber*, to be transported from *Hartford* to *Boston*, at customary freight, dangers of the seas excepted.

"NATHANIEL HURLBUT.

"HARTFORD, *November 27, 1816.*"

But it is said that the evidence offered does not contradict, vary, or impeach the written contract, but rebuts a *presumption* arising from it that the defendants were bound to proceed on the voyage by the nearest and shortest course. It is the same question, in a different shape. It is an attempt to attach, by parol, a different meaning to language, and, consequently, make a different contract from the written one. Abbott on Shipping, 239, says: "The master must proceed to the port of destination without delay, and without stopping at intermediate ports, or *deviating from the straightest and shortest course.*" And why? Because such is the contract in terms. The words in the bill of lading are, "Now lying in the port of Buffalo, and bound for Cleveland." Now a new contract must be made before Otter creek or the Canada shore is the place to which the vessel is bound, or to which she is permitted to go.

The *course* to be pursued and the *time* of leaving are *important incidents* to the contract, which the *law attaches*, and which are as binding as if expressly stipulated in the contract, and can not be rebutted or impeached by parol in the one case more than in another.

A *note* or *bond* in which *no time* is specified, when payable or 342] due, the law declares them to be due *presently*, and *parol* evidence is not admissible to contradict this fact or presumption. *Thompson v. Ketcham*, 8 Johns. 148, top paging.

Chief Justice Kent says: "When the operation of a contract is clearly *settled* by *general principles* of law, it is taken to be the *true sense* of the contracting parties, and it is against established rule to *vary* the *operation* of a writing by parol proof."

Now the *course* which the master should have pursued, in going to *Cleveland*, is as well "*settled* by *general principles of law*" as the time of payment of a note in which no time is specified, and *parol proof* is as admissible in the one case as in the other. 1 Phil. Ev. 489, and see note.

2. Are the declarations of S. Thompson & Co., the forwarding merchants, admissible, etc.?

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It appears that S. T. & Co. acted as the *agents* of the plaintiff in forwarding the property to Cleveland. Their *agency* consisted simply in *forwarding*; and their powers, as *agents*, authorized them and required them to do this in the safest and most direct course, or at least in the *ordinary and usual course*; and they had no power or authority to send the property by *Otter creek*, or the *Canada shore* or *Green bay*, or any other place, unless particularly authorized so to do, or unless that was the *ordinary and usual course* pursued.

That Otter creek was the ordinary and usual course pursued by vessels in going from Buffalo to Cleveland is not contended, and therefore *parol* evidence is sought to be introduced to contradict the *written contract* made by the parties. But if admissible, does it help out the *defendant*? That S. Thompson & Co. had other than the ordinary powers of forwarding merchants is not contended. And what are those powers?

In *Barber v. Bran, etc.*, this same question was raised. But Hosmer, C. J., in delivering the unanimous opinion of the court, omits to express a decided opinion, upon the ground that the question is not presented by the motion, but refers to *Fenn et al. v. Harrison et al.*, 3 Term, 757-760, as containing the law on the subject, the point established in which case is, "that a *special agent*, under a limited authority, could not bind his principal by any act beyond the scope of such limited authority." The powers, 343] then, of forwarding *merchants are to forward property in the *ordinary and usual course*, in the *ordinary and usual* mode of conveyance, in vessels that are esteemed safe and seaworthy; and if they pursue a different line of conduct, the principal is not bound by their acts. And if S. Thompson & Co. could, as forwarding merchants, subject the plaintiff to the risk and hazard of passing from the American to the Canada shore, they could, for the same reason, subject him to the risks and delays of a trip to *Lake Superior*. In fact, there would be no limit to the *powers* of such *agents*. 3 Conn. 9.

If the America had to pass over to *Otter creek* before she proceeded on her way to Cleveland, S. Thompson & Co. had no power nor authority to ship the *salt* of the plaintiff on board of her—of course had no authority to consent to her going there, so as to bind the plaintiff; and, therefore, if *parol* proof were admissible in ordinary cases, it would not help or avail the defendant in this

case; and, therefore, the exclusion of it furnishes no ground for a *new trial*.

But it is contended by defendants' counsel that as *parol proof* was offered to show the rights of the plaintiff to bring this action, that, therefore, as it was introduced for one purpose, it ought to be for another. To this there are several conclusive answers.

1. It is always permitted to show, by *parol*, in what capacity an individual acts, whether as principal or agent, whether in an official or private capacity. 3 Stark. Ev. 1047; 7 Taunt. 295; 5 Wheat. 326.

2. The consideration of a deed, as expressed to have been received. The date, etc., may be explained or contradicted by *parol*. Still *parol*, etc., will not be admitted to contradict the terms, or covenants, etc. So that *parol* may be admitted for one purpose and not for another. 4 East, 477; 2 Term, 366; 14 Johns. 210.

3. If *parol* was given to show the right of the plaintiff, it was entirely unnecessary and a work of supererogation; for it clearly appears, from the bill of lading, that S. Thompson & Co. acted as agents for S. P. Babcock. "Shipped, etc., by S. Thompson & Co., etc., for S. P. Babcock;" the plaintiff's name opposite the property which belonged to him; and no one, by reading the bill, could doubt but that S. *Thompson & Co. acted as agents for the [344 plaintiff; and the contract, therefore, was not made by S. Thompson & Co. as *principals*, with *Brown*, the *master*. But if it did so appear from the bill of lading, *parol* evidence is admissible, as above shown, to explain this.

The bill of lading is according to the *forms* used in this country, and in all the *essential* and *substantial parts* like the one referred to by defendants' counsel, in Abbott, 217—not as *religiously molded*, nor as lengthy—but still, it is believed, as correct and as obligatory. 2 Conn. 389; 3 Conn. 9.

CASE, in reply:

The defendants' counsel are too well aware of the existence of the rule that *parol* evidence shall not be given to contradict or vary solemn written agreements, to entertain the least idea of disputing it. And as little did they suppose it necessary to cite Blackstone's Commentaries, or any other book, to show what a contract was, to the Supreme Court of Ohio. All the authorities cited in plaintiff's argument apply to sealed or other authentic and solemn

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instruments, but have very little, if any reference, to a case like the one before the court. I shall, therefore, make no observations upon them. Those to the point, that parol evidence shall not be admitted to vary, etc., do not, I apprehend, apply to such a bill of lading as the one under consideration. Suppose A. makes a deed to B., with covenants of warranty and seizin, will the court hear evidence that B. acted in the purchase as agent for C., in order to enable C. to bring and maintain action on the covenants of warranty and seizin. Such is the case here. S. Thompson & Co. is one party in this contract, if it is one, and the owners of the schooner the other. Now, if it is on the footing of the conclusive written instruments, the action could alone be brought by S. Thompson & Co.; but the action is brought by S. P. Babcock, the party in interest. He has shown his interest, and because other evidence than the bill may be given, and has been given (and I admit properly), he has supported it, but could not upon the principle that the bill is exclusive and conclusive evidence between these parties. 345] And if the authority cited, 2 Camp. *38, proves anything to the case, it proves that the plaintiff ought to be nonsuit, because the bill of lading shows no property in Babcock. The words in the margin, "for S. P. Babcock," signify that such marks were on the barrels of salt, as the bill of lading explicitly states, in the clause immediately following, in the words "marked as per margin." Salt is marked with the initials, or name of the owner, at the works. Their owners change every day, but the marks remain, and are used in bills of lading in the same manner as the name of a manufacturer and No. stamped on the lead appended to a piece of broadcloth, which passes through numerous ownerships and invoices before it is finally consumed, always, however, answering the purpose of marginal description.

The authority, in Abbott, 239, produces the consequences mentioned in the opening argument, viz: that stopping at intermediate ports would render the carrier liable; and the court must permit parol evidence to control the ordinary bills of lading to rebut the presumption that a direct course of voyage was intended, or render liable the carrier in all cases of loss. There is no alternative. The universal practice, for thirty years past, plainly shows that the authority of Abbott, and other maritime and mercantile writers, either have no application on Lake Erie or must be received with great limitations.

If the court shall be of opinion that the evidence rejected, as inadmissible to explain or aid the bill of lading, ought to have been admitted for the purposes offered, if the shipment had been made by Babcock and the bill of lading executed between him and Brown, the defendants' counsel submit, that a new trial ought to be granted, as it was upon the ground of admissibility that the evidence was rejected at the trial, and not because the agents, Thompson & Co., had no authority to make the arrangement offered to be proved.

The defendants' counsel insist, that the mere possession of the property, by a forwarding and commission merchant, lawfully obtained, enables the holder to make such contract for its transportation as he pleases, and the owner is bound. 2 Starkie, 57. Should the court think differently, however, as the evidence was rejected on the other ground, the defendant *had no opportunity to [346 prove the authority of Thompson & Co. to make the arrangement.

The defendant can abundantly prove that S. Thompson & Co., and the various companies of which S. Thompson has been a co-partner, have, for the last twenty years, exercised general and unlimited authority over property in their possession. No lake captain ever inquires what right they have over property. Thompson & Co. could have made an absolute sale of this salt as soon as it was received, and Babcock could never have reclaimed it. These observations, however, are foreign. The evidence was rejected on other grounds, before the trial had progressed to the proper point for the defendant to prove the authority of Thompson & Co.

In 2 Starkie Ev. 331, it is said, "If any *receipt* was given on the delivery of goods, it should be produced; and if any entry was made on the defendant's books, notice should be given to produce it, and also the way bill, if the goods were sent by coach. It should also be proved what orders were given at the time, as to the carriage of the goods and place of destination, and what were the written directions upon them."

This citation appears to me to contain almost any other doctrine than that the bill of lading or receipt is conclusive and final.

By the Court:

That a *receipt* may be explained by parol evidence is a principle too familiar to require authorities for its support. The bill of lading is a *contract* including a *receipt*. It is a contract admitting

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the reception of certain goods, with an agreement to carry them to the port of discharge; and the only doubt in the case is, whether the terms of this agreement, as reduced to writing, in the bill of lading, can be varied by parol. If the actual reception of the salt by the master, was the point in controversy, a different question would be presented. Such a case might come within the general rule of law, applicable to all receipts. But, in this case, it is agreed by all parties, that the salt was actually received by [347] the defendants, or their agent; and the only question is, whether the agreement, for the transportation of the salt thus admitted to be received, can be changed by parol testimony.

The legal effect of this agreement, as reduced to writing, is, to carry the goods from Buffalo to Cleveland by the most direct route conveniently adapted to that purpose, dangers of the seas, etc., excepted. The defendants seek to avoid this legal effect and the consequences resulting from its violation, by showing that it was a part of the agreement that the schooner might touch at Otter Creek, a place out of the regular course, and where she could not go except by such agreement, and that the master refused to receive the salt upon any other terms. This evidence comes within the direct operation of the rule that you shall not engraft a parol condition upon a written contract. *Serg. & R.* 469; *B. Mon.* 535; 1 *Starkie*, n. v. 361.

We consider this point of the case settled in 2 Conn. 9. "Where the master of a vessel, receiving goods for transportation, gave the shipper a writing, acknowledging the receipt of goods, and stating that they were to be transported to the place of destination as customary freight, dangers of the seas excepted, it was held that a parol agreement, between the shipper and master, before and at the time of giving the writing, as to the mode of stowing the goods, was inadmissible to show the terms of shipment, as all such communications between the parties are to be considered as merged in the writing."

But it is said that the court, in this case, admitted parol evidence of the custom of navigating Lake Erie. Evidence of this character is admissible, not to vary the contract, but for the purpose of carrying it into execution, as understood by the parties. This principle is laid down with great precision and force in 9 *Wheat.* 587. There is no rule of law better settled, or more salutary in its application to contracts than that which precludes the admission

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of parol evidence to contradict or substantially vary the legal import of a written agreement. Evidence of usage or custom is, however, never considered of this character, but is received for the purpose of ascertaining the sense and understanding of parties by their contracts, which are made with reference *to such [348 usage or custom; for the custom then becomes a part of the contract, and may not improperly be considered the law of the contract; and it rests upon the same principles as the doctrine of the *lex loci*. All contracts are to be governed by the law of the place where they are to be performed; and this law may be, and usually is, proved as matter of fact. See Doug. 511; 4 Mass. 155; 3 Day, 146; 1 Caine, 43; 18 Johns. 220; 5 Cranch, 492.

The evidence of the collector of the port, to show that the vessel was at liberty to visit the Canada shore, without incurring a forfeiture, can have no effect as between these parties, and is also liable to the same objections as the other testimony rejected.

Motion overruled.

EBENEZER HOOKER v. STATE OF OHIO.

Persons on trial entitled to peremptory challenge of jurors, may challenge for cause, and reserve his peremptory challenge.

ERROR to the court of common pleas of Ross county. Hooker was indicted for horse stealing. On the trial, two bills of exceptions were taken.

The first stated that after the prisoner had pleaded to the indictment, and the jurors called and impaneled, the prisoner moved the court to discharge one of the jurors *for cause*; but the court refused the motion until the prisoner should have made all his *peremptory challenges*.

The second bill of exceptions stated, that upon the trial, it was proved to the jury that the animal stolen by the prisoner was a *gray gelding*, and not a *gray horse*, as charged in the indictment; and thereupon the counsel for the prisoner moved the court to instruct the jury, that the prisoner could not be found guilty if the jury were satisfied that the animal stolen was a *gray gelding*, which instructions the court refused.

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349] *The prisoner was found guilty and sentenced. The writ of error was taken to reverse this judgment.

MURPHY, for the plaintiff in error :

1. No authority or dictum has been found in support of the opinion of the court below. On the contrary, the principle seems to be well settled, that if a juryman be challenged for cause, and be pronounced impartial, he may afterward be challenged peremptorily ; for otherwise the very challenge might create a prejudice in his mind against the party challenging. 4 Black. Com. 363 ; 1 Chitty C. L. 545 ; 4 Harg. St. Trials, 738-740, 750 ; Wma. Jus. 189 ; Bac. Ab., Jurors, E. 11 ; Burns' Jus. 4 ; 2 Hawk. P. C. 2, ch. 43, sec. 10 ; 3 Coke Lit. 158.

2. The operative words of the act, on which the indictment rests, are, "if any person shall steal any horse, mare, foal, gelding, filly, ass, or mule, etc." The court, to support an indictment, can not arbitrarily give to its words and phrases a meaning with which the use, habit, or understanding of mankind would disagree. Chitty C. L. 196. Much less can they give a meaning repugnant to the express act of the legislature.

It may be urged that the term "horse" is a *generic* term, and therefore includes a gelding. If this reasoning be correct, the generic term "horse" will include mare, foal, filly, and, perhaps, ass or mule. For Johnson defines a horse to be "a neighing quadruped, used in war, draught, and carriage."

This conviction could not be pleaded in bar to an indictment for stealing a gray gelding. 2 Leach, 503. An indictment for stealing clothes, or wearing apparel, or for stealing twenty ewes and lambs, or twenty ewes and wethers, is bad for uncertainty. So evidence of stealing shoes will not support an indictment for stealing boots. Archbold C. L. 22.

So 15 Geo. II., ch. 34, and 14 Geo. II., ch. 6, make it felony to steal any cow, heifer, ox, etc. If an indictment, under this statute, charges the prisoner with stealing a cow, and the evidence shows it to be a heifer, the variance is fatal. 2 East P. C. 617 ; Leach 123 ; 1 Camp. 212.

350] *The same principle is recognized in Archbold C. L. 63 ; 1 Hale, 513 ; 2 East P. C. 514 ; Leach, 286 ; 3 Camp. 264 ; 1 Holt 595.

There was no argument on the other side.

By the COURT:

1. In the administration of criminal justice, it is of the first importance to secure an impartial tribunal. For this reason, the law gives to the party accused the right of challenge. This right may be exercised indefinitely, upon cause shown, and to a limited extent without cause, or peremptorily. The question is, whether this right of peremptory challenge may not be reserved, by the party accused, until after he has made all his challenges for cause. Prejudices often exist, for which no cause can be assigned. The personal appearance of an individual often creates the most unaccountable prejudices. The mere challenge for cause may provoke resentment, if the reason assigned prove insufficient to set aside the juror. The trial of a juror, challenged for cause, may excite a prejudice, which does not amount to a legal disqualification, but to the influence of which, the party accused ought not to be compelled to submit. For these reasons, the law has wisely provided, that the right of the peremptory challenge ought to be held open, for the latest possible period, to wit up to the actual swearing of the jury. 4 Black. Com. 366; 4 Har. St. Tr. 738-740, 750; Bac. Ab., Jury, E. U. Done, Sig. 329.

2. The objection raised by the second bill of exceptions seems too insignificant to demand a serious consideration. The term *horse* being a generic name, ought to include every variety of the animal, as diversified by age, sex, occupation, or modification.

The English authorities, however, and which have been recognized in several states of the Union as sound law, are too strong to be resisted and too pointed to be evaded. It is the duty of the court not to make, but to declare the law. *Ita lex scripta est*, precludes all inquiry into the reasonableness or propriety of the objection.

Judgment reversed.

351] *THE STATE OF OHIO, ON THE RELATION OF QUINTUS F. ATKINS, v. GEORGE TODD AND OTHERS, JUDGES OF THE COURT OF COMMON PLEAS OF THE COUNTY OF ASHTABULA.

Rule of the court of common pleas to show cause why a *mandamus* should not issue to sign a particular bill of exceptions, discharged upon cause being shown that the bill of exceptions in question did not correctly state the facts of the case.

At the August term of the Supreme Court in Ashtabula county, in the year 1826, Atkins obtained a rule upon the defendants, to show cause, at the next term, why a *mandamus* should not issue, commanding them to sign a certain bill of exceptions, tendered on a trial, in the court of common pleas. At the August term, 1827, the rule was extended to the next term. At the August term, 1828, the defendants having failed to show cause, the rule was made absolute, and a *peremptory mandamus* awarded. At the August term, 1829, the defendants, Todd and Kellogg, appeared, and having satisfied the court that they had omitted to show cause against the rule, under a misapprehension of the course of proceedings, in cases of the sort, and that no intentional contempt was committed, the rule for a *peremptory mandamus* was vacated, and cause permitted to be shown. Hays, one of the associate judges, had complied with the *peremptory mandamus*, and signed the bill of exceptions. Keller, another of the associates, was dead. The defendants, Todd and Kellogg, showed for cause, that to the best of their recollection and belief, the bill of exceptions did not contain a true statement of the facts, and that they believed such statement untrue and colored, and therefore they refused to sign it, etc. The case was thus continued to August term, 1830, when it was reserved for decision in this court.

GIDDINGS, for the plaintiff.

There was no argument on the other side.

By the Court:

The authority to issue a *mandamus*, in a case like the present, can not be doubted. The power is incident to supervising courts,

and there are instances of its exercise, both in England and in our own country.

*But this power is to be exercised in such a manner as [352 best to promote the advancement of justice, and the only legitimate object of its exercise, in cases of this sort, is to compel the court below to place upon the record a true statement of the facts as they existed.

The bill of exceptions is in practice, and by law, to be signed and sealed only, not to be prepared by judges; the only obligation upon the judges is to sign and seal a true bill of exceptions.

But the object of the relator is not to compel the judges to sign a correct bill of exceptions, but to sign the bill offered. The motion in 1827 is for a *mandamus* to sign "the bill" presented, or show cause, etc. The cause shown is that the bill presented did not contain a true statement of the facts. It does not appear that the judges refused to sign any and every bill of exceptions; but they refused to sign the bill presented, because it was not true. The power of determining whether a bill of exceptions is true, or not, is vested in the judges, to whom it is presented for signature. In this case, that power has been exercised, and the return of the judges shows that the bill, as tendered, was not true. In this matter, thus presented, we may adopt the language of the chief justice of the United States, in a case that bears a very close resemblance to the present. 4 Pet. 106. "If the court had granted a rule to sign a bill of exceptions, the judge could have returned that he had performed that duty. But the object of the rule is to oblige the judge to sign a particular bill of exceptions, which had been offered to him. The court granted the rule to show cause, and the judge has shown cause, by saying that he has done all that can be required of him, and that the bill is not such a one as he can sign. Nothing is more manifest than that the court can not order him to sign such a bill of exceptions."

If the return be false, or if there be a refusal to sign any bill of exceptions, we need not indicate a remedy.

The rule for a *mandamus* is discharged, and the case remitted that the relator may apply for a *mandamus* to sign a bill of exceptions, or show cause, etc.

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*POLLY GRAY v. THE STATE OF OHIO.

A negro is not an admissible witness, against a quarteroon, on trial charged with a crime.

ERROR to the court of common pleas of Hamilton county. Polly Gray was indicted for robbery. On the trial, at November term, 1829, the prosecuting attorney called to the stand a *negro*, as a witness in behalf of the state. The counsel for the prisoner objected to his admission, on the ground of incompetency, under the statute regulating black and mulatto persons. The prisoner appeared, upon inspection, and of such opinion was the court, to be *of a shade of color between the mulatto and white*. The court overruled the objection, and the witness was admitted. To this opinion of the court, the counsel for the prisoner excepted; and the verdict and judgment being against her, she brought her writ of error.

VAN MATRE, for plaintiff in error:

A mulatto is a person begotten between a white and a black. 7 Mass. 68. The prisoner, then, not being a mulatto, would be competent as a witness where a white person was a party. She thus being upon a level with whites, the same privileges ought to be extended to her.

WADE, contra:

The record shows that the prisoner was not a white person. The statute extends only to cases where the party to the suit is white; and being highly penal, should receive a strict construction. Quarteroons may testify against white persons, not because they are white, but because the prohibition of the statute does not extend to them. The statute does not prohibit a black or mulatto from being a witness against an Indian. It is silent, as it regards persons of the prisoner's color, being neither black, white, nor mulatto. The common law rules must therefore apply.

354] *By the Court:

The witness was improperly admitted. The statute compels courts of justice to reject black and mulatto witnesses, where a

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white person is a party. The statute is one which a court is called upon to execute with reluctance, yet where a case is presented, the court has no alternative but to yield to the expression of the legislative will. Three descriptions of persons are designated, by name, in the statute—white, black, and mulatto; and these three are well known, by the same terms, in common life; but we doubt whether we can refine upon these obvious distinctions, or whether good policy, or good sense, requires us to raise the necessity for further discrimination. We are unable to set out any other plain and obvious line or mark between the different races. Color alone is sufficient. We believe a man, of a race nearer white than a mulatto, is admissible as a witness, and should partake in the privileges of whites.

We are of opinion that a party of such a blood entitled to the privileges of whites, partly because we are unwilling to extend the disabilities of the statute further than its letter requires, and partly from the difficulty of defining and of ascertaining the degree of duskiness which renders a person liable to such disabilities.

Judgment reversed.

THOMAS COLVIN v. ELIJAH CARTER.

When A. obtains credit from B., upon an agreement to pay and take up certain notes made by B. and indorsed by C., as they become due, and fails to do so, B. may recover the amount due, and A. can not set up his liability as an offset.

CARTER brought an action of assumpsit, in the court below, against Colvin, and declared upon the common counts, for goods sold and delivered, and upon a special contract. Colvin pleaded the general issue, with notice of offset.

On the trial, Carter produced and proved a written agreement, dated June 16, 1828, signed by Colvin, in which Colvin, in consideration of a bill of merchandise, that day *purchased of Car- [355
ter, amounting to one thousand seven hundred and thirty-two dollars and ninety-eight cents, agreed to pay for Carter certain notes of hand, to the amount of one thousand seven hundred and five dollars and fifteen cents, signed by Carter, and payable to and indorsed by Colvin, as they might severally fall due, and also to re-

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lease Carter from all liability on said notes; which notes were then held by several individuals, and had all become due before the commencement of the present suit.

The plaintiff also proved an account for other goods, to the amount of ninety dollars and eighty-five cents, and there rested his case, without proving that he had paid any part of the notes mentioned in said agreement.

The defendant then proved that he had paid a part of the notes, amounting to four hundred and fifty-five dollars and fifteen cents; and that another part had been sued, and judgments rendered both against Carter and Colvin, and upon which both were liable; and that the residue of the notes were unpaid, and upon which both Carter and Colvin were liable.

The defendant also proved that *previous* to the execution of said agreement, he had paid to several persons the sum of two hundred and fifty dollars, in satisfaction of debts due by Carter, and for the payment of which Colvin was liable, as security.

Upon this state of facts, the defendant moved the court to instruct the jury that Carter was entitled only to nominal damages, under the agreement, unless he proved that he had paid the notes, or that Colvin was released from all liability thereon; but the court refused this instruction, and charged the jury that Carter was entitled to recover the full amount of the consideration of said agreement, deducting the amount of the notes paid by Colvin, notwithstanding Colvin might be liable upon the notes unpaid.

The court also instructed the jury, at the request of Carter, that the agreement in relation to the notes was presumptive evidence of a settlement of all previous accounts between the parties, but was not conclusive, and the jury must judge, from all the circumstances attending the transaction, whether the two hundred and fifty dollars paid by Colvin previous to the agreement had been refunded by Carter.

356] *To these opinions of the court, the defendant, Colvin, excepted. The jury returned a verdict of one thousand four hundred and nine dollars and eighty-nine cents in favor of Carter, and judgment having been rendered thereon, Colvin prosecuted his writ of error.

STOREY and FOX, for plaintiff in error.

CASWELL and STAR, contra.

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Opinion of the court, by Judge COLLET:

It is contended for Colvin that the opinions of the court of common pleas, contained in the bill of exceptions, are erroneous. It is the opinion of this court that the court of common pleas did not err, when it refused to instruct the jury that Carter was entitled to nominal damages only. The goods were sold by Carter to Colvin, on a limited credit, limited to the time that the notes of Carter became due, which Colvin had agreed to pay. The clause in the agreement, that Colvin should release Carter from all liability on the notes, does not extend the time of payment beyond the times when the notes became due, or authorize Colvin to retain the money, the price of the goods, after the notes became due.

When an indorser pays to the holder the amount due from the maker of a promissory note, the maker is still liable on the notes to the indorser. This was the reason of this agreement of Colvin to release Carter. It was an agreement that as he paid and took back the notes of Carter, that he would cancel them. It did not extend the times of the payments before fixed, but was limited by those times.

Colvin, by the contract, was authorized to retain the price of the goods until the notes of Carter, which he had indorsed, became due, and then to pay for the goods by discharging the notes, and thereby to prevent himself from being made liable, as indorser, but he was not authorized to retain the price of the goods for so long a period.

The indorser of a note due and unpaid can not offset the amount due on the note against a claim of the maker, or *success- [357 fully urge it as a defense against a suit brought by the maker.

The violation of this contract left in the hands of various persons several notes of Carter, due and unpaid, by which his credit would be injured, and he would be liable to several suits. As Carter had reason, more than in ordinary cases, to be desirous that Colvin should punctually perform his contract, so he had greater reason than in ordinary cases, to rely on Colvin's punctuality in the performance of it, as when he paid his debt to Carter, according to his contract, he would at the same time have discharged his own liability to the holders of Carter's notes. It would seem that Carter was entitled to increased, rather than nominal damages. As to the opinion of the court of common pleas, as expressed in their charge

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to the jury, in relation to the offset of Colvin, the charge must all be taken together, and in the sense in which the jury would understand it. It would then apply only to the two hundred and fifty dollars, this being the only claim offered in evidence as having existed prior in date to the written contract. When so taken, it is that the agreement was presumptive evidence, but not conclusive of the settlement of the two hundred and fifty dollars; and that the jury, in determining whether Carter had paid the hundred and fifty dollars to Colvin, would take the making of the agreement, and all the circumstances attending the transaction, into consideration.

When Carter was selling to Colvin, on credit, more than one thousand seven hundred dollars worth of goods, and authorizing him to pay nearly the whole of the price of the goods, in discharge of the notes of Carter which were not then due, and on which Colvin was indorser, it does seem reasonable to conclude that Colvin would have remembered and mentioned to Carter, that Carter then owed him two hundred and fifty dollars for payments he had before made, on the notes of Carter, which he had indorsed, and that it would then have been paid by Carter. Why should it not have been done? It would have been better for Colvin, at once, to have had the credit, and as well for Carter. Carter's obligation to pay as soon as he knew of it was great. His friend had had to advance 358] his money for him. The presumption *of payment is not as great as that the first quarter's rent is paid, from the landlord's receipt for the second quarter's rent; but it is such as would have weight with any sensible man who had to determine whether the two hundred and fifty dollars had, or had not been paid, and ought therefore to go to the jury as presumptive evidence.

The court do not presume there is error in this charge. The judgment must, therefore, be affirmed with costs.

JOHN BIGELOW AND MARIA, HIS WIFE, v. WILLIAM BARR AND
OTHERS.

The acquiescence of a female devisee in the construction of the will, given by her brother-in-law, upon the death of her husband and child, does not conclude her, if it be an incorrect construction unfavorable to herself, and predicated upon no new and valuable consideration.

THIS was a bill in chancery, to establish an equitable life estate in the complainant, Maria Bigelow; and was reserved from the county of Hamilton.

William Barr, Sen., died in May, 1816, having made his last will, devising one hundred and sixty acres of land near Cincinnati, to the defendants, William Barr, James Keys, and John B. Ennes, his executors, upon the following trusts: "First. For the use of my son, John M. Barr, during his natural life, but nevertheless to permit and suffer my son, John M. Barr, to hold, use, occupy, possess, and enjoy the same, and to receive and take the rents and profits thereof, during his natural life. And in case my said son, John M. Barr, should die, leaving a legitimate child, or children, then also in trust, for Maria Barr, wife of the said John M. Barr, in case she survive him during her natural life, for the purpose of maintaining herself, and her child, or children, and educating the said children; but nevertheless to permit and suffer the said Maria Barr to hold, use, occupy, and enjoy the said farm, and to receive the profits during her natural life. And upon the decease of the said Maria Barr, wife of the said John M. Barr, in case he survive, if not, then upon the decease of John M. Barr, I do further give and devise the remainder of my estate, in said farm, to him or her, or his or *her heirs forever. But if he [359 have two or more children, then I give and devise the said farm unto such children, and their heirs, to be equally divided between them. But should my son, John M. Barr, die without having any issue of his body, then, and in that case, I give and devise the remainder of my estate in said farm, unto my said sons-in-law, William Barr, James Keys, and John B. Ennes and their heirs forever. And if the present wife of my son, John M. Barr, should survive him, dying without bearing any legitimate issue, then I direct my said sons-in-law, their executors and administrators, to

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pay, or cause to be paid, unto her yearly, and every year, during her widowhood, the sum of two hundred dollars. And if, during her widowhood, she should again be lawfully married, then I further direct my said sons-in-law to pay her the sum of one thousand dollars," etc.

John M. Barr died in August, 1820, leaving his wife Maria, and one child. In November, 1821, the child died, leaving the said Maria, wife of John M. Barr, who intermarried with the complainant, John Bigelow, in October, 1824. In the lifetime of John M. Barr, the defendant, William Barr, at his request, leased the premises for several years. The tenant, in possession, in the year 1827, attorned to the complainants. The defendants prosecuted a suit of forcible detainer, and recovered judgment, which is still pending on error. The bill charged that the defendant, William Barr, claims the premises, by virtue of some pretended agreement, to accept the two hundred dollars annuity, instead of the life estate of the complainant, Maria Bigelow; that she never made such agreement, and prays for an injunction, account, etc.

The defendant, William Barr, admitted in his answer the material facts charged in the bill, but set up a verbal agreement made on the death of the child of John M. Barr, between the complainant Maria, then unmarried, and the defendant, by which she agreed to receive the annuity of two hundred dollars per annum, during her widowhood, and one thousand dollars upon her remarriage, in satisfaction of her claims under the will. That under this agreement he, in his own behalf and in behalf of the other executors, took possession of the premises, as their own property, in 360] the latter *part of the year 1821, with the consent and approbation of the complainant Maria. That the defendant Keys, being in failing circumstances, on December 28, 1821, gave the said Maria a mortgage upon the premises to secure the payment of his third of the annuity, and of the one thousand dollars upon her remarriage; that she accepted this mortgage, and in 1826 the complainants prosecuted this mortgage and recovered a judgment thereon. That the annuity of two hundred dollars was paid during the widowhood of the complainant Maria, and also since her intermarriage, principally in rents which were received by the complainants, under the said agreement, until 1826. The defendants, Keys and Ennes, are embarrassed; but he, William Barr, is willing, and offers to pay up the thousand dollars, upon a

proper release being made by the complainants. That he has kept no accurate account of the rents or moneys paid to the complainants, as the tenants often paid the rents directly to the complainants; but alleges that the complainants were fully paid to the amount of the annuity until the year 1826 or 1827. That in 1827 the complainants, by collusion, procured the tenants in possession to attorn to them, etc.

The testimony taken in the case showed that the child of John M. Barr and of the complainant Maria, died in November, 1821, and did not establish an independent parol agreement as alleged in the answer. It only made out an acquiescence of the complainant Maria, in the construction put upon the will by her three brothers-in-law.

HAMMOND, for complainant, maintained that the will created:

1. A trust for John M. Barr during life.
2. In case John M. Barr die, leaving a child and his wife, then a trust for Mrs. Barr during her life, to maintain herself and child.
3. If John M. Barr leave issue, then upon the death of himself and wife, to such issue.
4. If John M. Barr die without issue, then the remainder of the devised estate to William Barr, J. F. Keys, *and J. B. En- [361
nes, and if he die without issue, leaving his wife a devise of two hundred dollars per annum to the widow during her widowhood, and one thousand dollars upon her marriage.

As the facts occurred, the complainants insist, that as John M. Barr died, leaving issue, the trust creating a life estate in the wife became vested and absolute. As *cestui que trust* for life, she is entitled to the possession and occupancy of the devised premises, by the very terms of the will. And this right is not affected by the subsequent death of the child.

With respect to the attempt to hold the estate, upon a contract with Maria Barr, there is no proof whatever sufficient to sustain it. It is without certainty, and without consideration, and never has been executed, or offered to be executed, by the defendant.

The mortgage from J. F. Keys conveys no title. Upon the death of John M. Barr, the devise so took effect as to vest an estate for life in Maria Barr, the remainder in fee in the child. This was, in the child, a vested remainder, and under section 1 of

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our statute of descents, vol. xxii. 133, clause 4, passed to the brothers and sisters of the devisee, or donor.

The claim of William Barr, the defendant, is unfounded, perverse, and vexatious. The judgment, in forcible detainer, being founded on the technical doctrine of landlord and tenant, ought not to be sustained. The plaintiff, in that judgment, had no right to the possession against Bigelow. He ought to be enjoined and compelled to pay costs. He ought, also, to account for the rents and profits, and for waste.

N. WRIGHT, for respondent:

I contend that the facts show a construction given to this will, and settled between the parties, which the court will not now disturb.

The point of doubt in the construction is this: the will gives the rents and profits to Maria Barr (in the case as it has happened), for the maintenance of herself and child, and the education of the child.

362] *It is a rule in the construction of wills, that, if a bequest is made to one with a *request* or *recommendation*, that it be applied to this or that purpose, or for the benefit of this or that person, where the subject and the object are pointed out, that it amounts to a trust for that object, and is limited to the purpose for which it is given; and when that object is accomplished, the residue goes to subsequent bequests, or results to the heir for want of them.

In *Robinson v. Taylor*, Lord Thurlow says, "when property is given for specific purposes in trust, nothing more is subject than those purposes require." 1 Ves. jr. 44.

So Lord Hardwicke, "the general rule, that if bounds are devised for a particular purpose, what remains after that purpose is answered results has several exceptions." *Hill v. Bishop*, 2 London, 1 Atk. 619.

So Lord Eldon: "It is not universally true, that the expression of a purpose for which even a devise of land is made, confines and limits the devise to the purpose so expressed. When the devise is something beneficial to the devisee, the presumption is stronger that the benefit specified, is the only benefit he is to derive." *Walton v. Walton*, 14 Ves. jr. 322.

Brown v. Lasaneajar seems to have been finally disposed of in part by consent; but it appears to have been understood, on all

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sides, that this language in a will, "I give to H. S. seven thousand pounds, the better to enable him to provide for his younger children," creates a trust for those younger children. 4 Ves. 498.

So, "I give certain goods to my wife, desiring her to provide for my daughter," creates a trust for the daughter. *Pushman v. Felliter*, 3 Ves. 7.

And there are many similar cases. 18 Ves. 41.

To apply these principles to Barr's will: the rents and profits are given to Maria, for a distinct and specific purpose, the support of herself and child, importing some benefit to herself, and thereby restricting it to the particular benefit specified, that is, the joint support of herself and child; when this object is accomplished, the bequest ends, unless by some implication it can be continued for her separate support. Is there any such implication in the will? I think not; but directly contrary. A separate provision is made for her *in money, clearly distinguishing between [363 the joint support of herself and child, and the individual support of herself.

It is plainly the intent of this will that the land in question shall remain in the family of the testator; it is given in various forms, for the benefit of J. M. and Maria Barr, and their children; and then to the executors, who are children, or represent children, of the testator. If this devise vested in the child, so as to pass to its heirs in the line of the testator, under our statute, it passes entirely out of the family of the testator. If, on the contrary, it did not vest till the death of the parents, then it goes to the executors by the will, they being chargeable with the annuity and marriage portion of Maria, which is clearly the spirit of the will. In this way the expectancy of the estate ceasing to which the intermediate rents and profits were naturally connected, those rents and profits would naturally cease, leaving her to the gross sums provided for her, and the fee to the executors, either by the words of the will or the implication arising from the charge of the money. The residuary clause of the will is to the executors.

Without going into the intricate law on the subject of executory devises and contingent remainders, connected with the latter of the foregoing suggestions, there is at least enough to show that the construction given by the parties is the most conformable to the manifest wishes and design of the testator.

Independent of the conduct of the parties, I contend that the

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right to the use of the land, during the life of Maria, ended with the death of the child, for whose support it was given; the child had clearly no interest in *possession* during the mother's life, other than the trust interest in the use in conjunction with the mother, and this use is not for the survivor of them, or either of them severally.

But whether I am right in this position or not, I contend that the parties have settled this matter among themselves, and it should not now be disturbed.

This may be considered, in the light of an agreement, for which there is sufficient consideration, and on which the defendant acted for several years, Maria acquiescing therein, and receiving the consideration, which was the annuity.

364] *Or it may be considered in the light of a construction given to the will, by the parties, which ought not to be disturbed in equity.

After the parties have made their arrangements, proceeded on their own notions of right, and the defendant has been suffered to proceed under that arrangement for five or six years, keeping, of course, no account of the rents, and unable to settle the account on any other ground than that of the arrangement, after securities have been taken for the money due on that arrangement, and judgment actually rendered on that security, which stands in full force and within the power of the complainants to collect, at any time, will the parties be allowed, without a cause, to disturb such an arrangement? After receiving the benefit of it for that period, when it was most beneficial, will they be allowed to call on the party, treating it as a nullity?

When parties have given their own construction to an uncertain instrument, perhaps more in conformity with the real intention of the maker than the strict letter of the law could give, equity will leave them to their own construction. It is evident, from the reading of this will, that the particular state of facts which has happened, was not in the contemplation of the testator. The construction, therefore, must be left to inference, and it is a case peculiarly suitable for adjustment among the parties themselves.

On the question of account and costs, under the circumstances of this case, an account can never be claimed. Complainants have got more than the lands were worth, but it is their fault that we can not show them the items.

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The costs in the detainer case arose from the default of the complainants, as is evident from looking into the record of that case. When we had been long in possession, under the arrangement acquiesced in even by Bigelow himself after marriage, the treachery of our own tenant is used to take from us that possession. The man who came in under our tenant owes us allegiance, and violates his contract and his faith, if he does not restore to us the possession. Equity will never so far forget the respect due to good order and good faith as to countenance this sort of scrambling for possession. Let the man who claims possession against us claim it by law, *and not by corrupting our tenants. Salyards and [365 Peterson, the defendants in the detainer suit, had no connection with Bigelow, so far as we had right to know, nor could they lawfully have, coming in under our tenant. The costs in that suit are for their own wrong, in refusing the possession to us, from whom they had received it. If Bigelow has become responsible for them, he stands merely as the indorser for a wrong-doer, and answerable for his torts. 3 Ohio, 527.

In *Barr v. Hatch*, where this court gave relief against judgment, in ejectment, against a clear equity, they still charged the complainant with all the costs at law, and half of these in chancery.

Opinion of the court, by Judge BRUSH:

The object of the bill is to establish the right of the wife, Maria Bigelow, to the use and possession of a farm of one hundred and sixty acres of land, lying in Hamilton county, by virtue of the will of William Barr, Sen., deceased, for and during her natural life; and to enjoin further proceeding at law upon a judgment in forcible detainer obtained against the tenants of complainants. The clause in the will relied upon reads thus: "And in case my said son, John M. Barr, should die, leaving a legitimate child or children, then also in trust for Maria Barr, wife of the said John M. Barr, in case she survive him, during her natural life, for the purpose of maintaining herself and the child or children, and educating the said children; but nevertheless to permit and suffer the said Maria Barr, wife of the said John M. Barr, to hold, use, occupy, and enjoy the said farm, and to receive and take the rents and profits thereof during her natural life." The said John M. Barr, former husband of complainant, Maria, died August, 1820, leaving said Maria and a daughter, the legitimate issue of both;

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and thereupon, the estate, thus limited and declared in her favor, became and was absolutely vested in her, for and during her natural life. But it is said this estate, thus expressly devised to complainant Maria for life, was nevertheless subject to be defeated by the death of the child; as thereby the object and purpose of the devise fails or is accomplished. And as the child died in *November, 1821, about one year and three months after her father, the estate thereupon was defeated, and, by another clause in the will, passed to the defendants, J. Keys, J. B. Ennes, and W. Barr, as executors and residuary legatees. And this is argued by defendants' counsel, not on the ground that the testator has expressed any such intention or wish in the will, but for the reason above suggested, that the purpose of the devise in favor of complainant Maria was accomplished when the child died; in other words, that the purpose and object of the devise was the maintenance and education of said child. Although this is expressed to be one purpose, yet it is believed that the primary object and *chief* purpose was the maintenance and support of the mother, during her life, thereby to enable her to do her duty to her child or children. This was expected of her, and that of course she would raise and educate such and so many as her late husband left with her. It is true, according to the authorities cited by defendants' counsel, and upon principle, that "property given by will for certain purposes, results when those purposes are accomplished; or that nothing more is subject than those purposes require." But the application of the rule in this case is not so readily perceived. The testator has been explicit, and has directed, in the very next clause, that the remainder in fee, *upon the decease of said Maria*, shall go to said child or children and their heirs. Indeed, taking the two clauses together, he has so said expressly, and thus has left his intention unembarrassed, and not perplexed with any doubts whatever in relation to this matter. But there is another defense. Defendants sets up an agreement made, as he says, on the death of said child, between him, Ennes, and Keys, the other executors named in the will, of the one part, and complainant (of the other part meaning), in substance, that the annuity mentioned in the will of two hundred dollars, should be paid her while unmarried, and the one thousand dollars in lieu on her marriage, as a satisfaction of all claim on her part under the will. It is not said that the above agreement was in writing, nor is it stated to be a purchase

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by them or a sale by her of her life estate in said farm. But we understand defendant that it was an agreement to give her precisely what she was entitled to under the will according to the construction, he *and they and she gave to the will at the time. [367] They made a verbal agreement to give her what was her own, by the construction they put upon the will. Defendant says he did not advise her, as to the construction of the will, but left her to act for herself, and by the advice of her other friends. Her brother advised her. Defendant states unsubstantial and unsatisfactory apologies and excuses for not performing this agreement on their part. They were men dealing with a weeping widow, who, a little more than a year before, had lost her husband, and just then her only child! But the agreement is denied by her, and is not proved. And unsuitable as the time was, yet, in this respect, if it were otherwise, and the agreement stated was proved, it would be no defense against the right now claimed; because the right was not considered as existing and was not therefore the subject matter of the agreement.

The afflicted widow did not know, or imagine she was parting with an estate for her life, producing an income, if properly managed, of two or three hundred dollars a year, and likely to increase in value. It was not the understanding of the parties, as we learn from defendants' answer; but their understanding was, that she was entitled only to the annuity and the composition thereof, on her marriage. It was that they were making some efforts to secure and pay to her, but have failed almost, if not altogether to do that, even according to his own showing. If the life estate had been distinctly the subject matter of the agreement, it could not be set up in this instance, without overstepping the statute of frauds. Such part performance is the foot and ground of the agreement (supposing it to have been for the life estate) as would take it out of the operation of the statute, is not stated and evidenced by proof. And besides now, after so long delay, and the rise of property, it would be unreasonable to enforce any such agreement. The evidence is not favorable to this defense; so far from showing that Mrs. Bigelow considered or understood she was parting with the estate in controversy, it strongly countenances the contrary belief. Her conversations given in evidence, were about her rights under the will, not about any agreement she had made to part with any of them. So far as the depositions

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368] *relate conversations of the husband, John Bigelow, they are idle, as having no bearing upon the defense set up in the answer. They, however, prove nothing of importance in this case; and if they did, would be obnoxious to the objection, that they prove, if anything, a verbal conversation concerning the sale of real estate.

Decree for complainants.

TOM, A COLORED BOY, v. DAILY AND DESHA.

Where a slave is purchased under a promise to emancipate, such promise may be specifically executed in equity, against the purchaser, and against subsequent purchasers, without notice.

THIS was an injunction to restrain the defendants from interfering with the personal liberty of the complainant; and was reserved for decision by the Supreme Court in Hamilton county.

The bill, which was filed in the court of common pleas January, 17, 1829, in the name of Tom, by his next friend, Orange Witt, charged that Kate Daily, the mother of Tom, and sister of the defendant, Thomas Daily, was formerly a slave of Miss Baker, of Mason county, Kentucky, who intermarried with one Alexander Edwards. That Edwards died in 1823, and at a public sale made by his administrator, on the 8th of December of that year, Kate, being then *privement ensciente* with the complainant Tom, was sold to the defendant, Daily, brother of Kate, for the sum of one hundred and sixty-one dollars. At this sale, Daily made public proclamation, that his sole object in purchasing Kate was, to liberate her from slavery, and requested the bystanders to aid him in his benevolent purpose, by permitting him to purchase her without competition. In consequence of this public declaration, Daily purchased Kate without opposition, and immediately thereafter, pronounced her a free woman, and on January 12, 1824, duly emancipated her by deed. Soon after the sale, Kate removed to plantation of James Dummitt, of Mason county, Kentucky, where 369] she has ever since resided and where the *complainant, Tom, was born, soon after the purchase and verbal emancipation of his mother, Kate, by the defendant, Daily. Tom always lived

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with his mother, until she placed him, a short time since, under the protection of his next friend, Orange Witt, in Cincinnati.

Some time in April, 1828, the defendant, Daily, purchased a slave of the defendant, Joseph Desha, and to secure a part of the purchase money, gave Desha a bill of sale of the complainant. This bill of sale was to be void, if the purchase money should be paid by October 7, 1829. At the time this bill of sale was made, complainant was living with his mother, and he was not delivered to Desha. A short time before this bill was filed, Desha threatened to seize the complainant and reduce him to slavery, but his mother, hearing of these threats, sent him to Cincinnati, under the protection of Witt. Desha then made application to the mayor of Cincinnati, who issued his warrant, by virtue of which, the complainant has been taken into custody. The bill charges that Desha, when he took the bill of sale, knew that Daily never had possession of the complainant, and also knew that his mother Kate, on and before the birth of complainant, was equitably emancipated, although no deed of emancipation had been actually executed.

Prayer, that the defendants be enjoined from further interfering with the person of the complainant, and to restore him to freedom, etc.

Desha answered and admitted the pedigree of the complainant, as set forth in the bill, and also the sale made by the administrator of Edwards, but denied all knowledge of the declarations made by Daily of his intention to emancipate Kate. He denied that Kate was emancipated until six months, or more, after complainant was born. He admits that Kate, shortly after she was purchased, moved to the farm of James Dummitt, and alleges that when he purchased complainant from Daily, he left complainant with Dummitt, where he was to remain until he called for him. He denies that he knew when he purchased complainant that Daily never had possession of complainant; but Daily at that time informed him that he never intended to emancipate complainant. After defendant had bought the complainant, *he agreed to let the com- [370] plainant remain with Dummitt for a certain length of time, and that, if within that time, Daily paid him one hundred and twenty dollars, the purchase was to be canceled, and defendant was to restore the possession of complainant to Daily.

Daily also answered, admitting all the material allegations in the bill. He further stated that the complainant was not delivered

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to Governor Desha, at the time the bill of sale was executed, and that it was agreed between himself and Governor Desha, that Kate should not be informed of the bill of sale upon Tom, and that Governor Desha requested Dummitt to keep the matter a secret from Kate.

He neither denies nor admits the freedom of Tom, but alleges that he will pay Desha the hundred and twenty dollars when it becomes due.

It was proved, on the part of the complainant, that the sale of Kate was made, as set forth in the bill, and that she was declared free by Daily, the purchaser.

It was agreed between the parties, in writing, that Tom was born five months previous to the emancipation by deed, that neither Daily nor Desha had ever had the possession of Tom, and that Daily verbally told Desha he delivered the boy into his possession.

Robert Blanchard and John Rankin, on the part of the defendant, testified, that, in May, 1829, they heard the defendant, Daily, say that the sale of Tom to Desha was fair and *bona fide*, and the delivery was intended to be a delivery in fact of the possession.

Simon Baker testified that he had heard Daily claim Tom as a slave, and once said he would give him to the daughter of witness.

James Dummitt was present at the sale of Tom to Desha. The bill of sale was absolute, and was dated March or April, 1828. Daily delivered to Desha the possession of the boy, and at Daily's request he was permitted to remain with his mother. Desha requested witness to take charge of Tom until he should call for him. Witness kept the boy till he was carried to Cincinnati by his mother. After the sale was made, Desha agreed that if Daily would pay him one hundred and twenty dollars in eighteen months, 371] he would reconvey the boy Tom to *Daily. This agreement was reduced to writing, but it formed no part of the original bill of sale.

Hannah Paine was present at the sale of Edwards' property. It was generally understood, by persons present, that the intention of Thomas Daily in purchasing Kate was to free her from slavery, and in consequence of this understanding Kate was sold for less than half value. After the sale, Daily declared that Kate was a free

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woman and must provide for herself. James Dummitt was at the sale and purchased four of Kate's children, and requested Kate to go and live with him and bring up the children, and he would build her a cabin and find her provisions. Kate complied, and Dummitt sent his wagon and took Kate and the children home.

The court below dissolved the injunction and dismissed the bill, and the complainant appealed to this court.

No arguments were presented on either side.

By the Court:

This is a contest between the complainant, a colored boy, who asserts his freedom, and the defendant, Joseph Desha, of the State of Kentucky, who claims the complainant, as a fugitive slave, under the act of Congress of 1793. The only serious question between the parties seems to be whether the acts and declarations of the defendant, Daily, before the birth of the complainant, constitute such an emancipation of the complainant's mother as a court of equity will enforce.

It is a well-settled rule that no man shall take advantage of his own wrong. The conduct of Daily at the administrator's sale was a fraud. By his declarations and promises he was enabled to purchase his sister at less than half value; and that, too, by imposing on the humanity of the by-standers. Will a court of equity now permit him to turn round and claim his sister and her offspring as slaves? Where a widow stands by and hears her deceased husband's estate proclaimed for sale, free from dower, at public vendue, and is *silent, she shall be forever estopped to assert [372 her right of dower. 2 Ohio, 506. Where a grazier, driving a flock of sheep to London, was encouraged by an innkeeper to put his sheep into a pasture belonging to the inn; the landlord seeing the sheep consents that they shall stay there one night, and then distrains them from rent. The plaintiff was compelled to replevy, and at law the landlord had judgment; the plaintiff there filed his bill, and was relieved, upon the ground that the landlord should not take advantage of his own wrong. 2 Ves. 129.

This question, however, seems to be settled, and the controversy between these parties put at rest, by the Court of Appeals in Kentucky. 1 Bibb, 422. In that case it appears that one Thompson purchased a slave, named Will, from Ruth Wilmot, and expressly stipulated that he would manumit and emancipate Will in seven

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years. Will served the term of seven years, and then instituted a suit at law to recover his freedom, but failed, because the agreement was held not to amount to an actual and formal emancipation under the laws of Kentucky.

Will then continued in the service of Thompson for several years, until Ruth Wilmot, in behalf of Will, filed a bill in chancery setting forth the above facts, and which were admitted by the answer. The circuit court decreed that Will should be emancipated, and that Thompson should pay to Wilmot, in trust for Will, six hundred and ninety-one dollars and twenty-five cents, the value of his services after the expiration of the seven years. From this decree Thompson appealed, and Bibb, Chief Justice, in delivering the opinion of the court, affirming the decree, uses this language: "That the answer of Thompson does not afford a colorable pretext for withholding a performance of his engagement, solemnly made, under circumstances interesting to humanity and most obligatory upon a man of good conscience and unparalleled faith. The contract in itself was not forbidden by any political institution, but is in unison with the dictates of natural right, and was a most becoming subject for the court of chancery to act upon specifically."

We surely may be permitted to apply these doctrines to a case 373] where a *brother* is seeking to reduce *his sister and her *offspring* to slavery, in direct violation of his repeated and most solemn engagements.

The mother, then, in equity, which considers that as done which was agreed to be done, was virtually, if not actually and formally, free at the time of the birth of the complainant. It necessarily follows that the complainant was free. *Partus sequitur ventri*. 1 Littell, 319.

The complainant, therefore, being free born, is not the subject of property, and neither Daily nor Desha, who claim under him, have any rights as against the person of the complainant.

ROBERT WATKINSON v. JAMES ROOT.

In an action for the recovery of interest upon money, the interest is considered principal and bears interest from the time it became due.

THIS was an action of *assumpsit* to recover a sum of money, as interest, upon a special contract, and was reserved from Medina county.

There was a contract between the parties, dated in April, 1826, by which the defendant agreed to pay the plaintiff four thousand five hundred and eighty-six dollars, in four equal annual payments, in the years 1830-31-32-33, with lawful interest, to be computed from July 1, 1825, and to be paid annually. This suit was brought in 1829, to recover the arrearages of interest which had accrued; and the only question was, whether interest was allowable upon the successive annual charges of interest, after they fell due.

COWLES and ANDREWS for the plaintiff.

There was no argument on the other side.

By the COURT:

An agreement, after interest is due, to turn it into principal, is valid. 4 Term, 612; 2 H. Bl. 144.

*It is, however, understood that in England, at least un- [374
til recently, an agreement, at the time of an original contract, that if interest be not paid at the end of the year it shall be deemed principal, and carry interest, will not be enforced. 1 Johns. Ch., and cases cited. This is claimed to be a rule of policy, and it is supposed that a contrary rule would tend to oppression, hard dealing, and other evils. We deem it unnecessary to inquire into the correctness of this policy, although the current opinions of modern political economists render it at least doubtful.

Such a contract as the present is prohibited by no statutory provisions, and we see no reason why it should not be enforced. The decision of a respectable court is found (Adams, N. H. 179)

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where interest upon interest was allowed, in a case similar to the present, and we are willing to follow the precedent. (a)

(a) An action will lie to recover interest. 2 Mass. 613; 3 Mass. 221. Where money is payable on demand, interest is not recoverable until demand made. 4 Bibb, 246; 2 Bibb, 471.

ROBERT COWDEN v. JOSEPH HURFORD AND OTHERS.

Execution can not issue on a general judgment of restitution, without first issuing a *sci. fa.*

HURFORD and others recovered a judgment against Cowden in the court of common pleas of Jefferson county. Upon this judgment Cowden sued out a writ of error, and this court reversed the judgment, and thereupon rendered a judgment for costs, upon the writ of error, and for a restitution in the usual form, with a mandate to the court of common pleas to carry the same into execution. When this mandate came down, Cowden moved the court of common pleas to award a writ of restitution, which motion was overruled. He then applied to this court for a *peremptory mandamus* to the court below, or to award a writ of restitution returnable in this court. This application was reserved for 375] *decision here by the Supreme Court. The record of the judgment of reversal was not produced, nor did it appear that this court, in the judgment of reversal, had awarded the restitution of any certain sum of money; but upon the application to the court of common pleas for a writ of restitution, Cowden exhibited evidence of certain payments made upon the judgment reversed.

TAPPAN, in support of the application, cited 2 Salk. 588; 5 Com. Dig. 725.

There was no argument on the other side.

By the COURT:

A judgment of restitution is strictly a judgment which the court have inherent power to execute. 12 Serg. & Rawle, 292. And the

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court, in the case cited, hold that where this judgment of restitution is rendered, *assumpsit* will not lie for the money.

But the court are now called upon to point out the manner of executing this judgment. If the judgment of reversal contain evidence of the precise thing to be restored, the writ of restitution may be awarded. Cro. Car. 699. But where the matter to be restored is not specified in the judgment, but depends upon evidence *dehors* the record, it is inconsistent with the policy of the law to permit execution without an opportunity given to the other party to make his defense.

The proper remedy in such case is the writ of *scire facias*. Saund. 101, y; 2 Salk. 583. (a)

(a) For the form of a *scire facias quare restitutionem non*, see Lill. Ent. 641, 650; and for the form of a restitution, see Tidd's Prac. Forms, 541, 542.

*GEORGE W. STORY v. THEODORE HAMMOND AND OTHERS. [376

An action on the case lies for a nuisance affecting the health of the plaintiff and his family.

THIS was a motion for a new trial, reserved from the county of Cuyahoga.

The plaintiff brought an *action on the case*, to recover special damages, sustained by himself and family, in consequence of a mill-dam erected by the defendant across a branch of Yellow creek, in Cuyahoga county.

The plaintiff, in his declaration, alleged that the dam, by overflowing the adjacent lands, rendered the atmosphere exceedingly impure and unhealthy; and thereby occasioned the sickness of himself and family; and that he was put to great costs and charges, in and about curing himself, and his wife and children, etc.; and that he and his family had sustained a great loss of time, etc.

The jury rendered a verdict, in favor of the plaintiff, for one hundred and eighty-eight dollars and seventy-five cents; and the defendant moved for a new trial upon two grounds:

First. That the court permitted the plaintiff to give evidence, not only of his own sickness, but of the sickness of his family and

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the different members thereof, and the loss of their services, as a foundation for the recovery of damages.

Second. Because the court charged the jury that this action was, by law, sustainable, although the neighborhood generally was afflicted with the same injury sustained by the plaintiff and his family, and for which this action was brought. That if the jury were satisfied that the sickness of the plaintiff and his family was caused by the erection of the dam or nuisance, then the plaintiff had proved a damage done to himself and family sufficiently special to entitle him to recover, notwithstanding the neighborhood generally was proved to have sustained the same injury. That the defendant, having been indicted and plead guilty, under section 43 of the "act for the punishment of certain offenses therein named," previous to the commencement of this suit, formed no bar to this action, and that the private remedy of the plaintiff was not thereby taken away.

377] *It was proved on the trial, that Yellow creek was not a navigable stream, and that the dam was erected upon the lands of the defendant, in the vicinity of the plaintiff's residence.

HUMPHREY & KIRKUM, in favor of the motion.

WILLEY & OLCOTT, contra.

By the COURT:

The declaration is somewhat loose and inartificial, but is substantially good. No other evidence was admitted on the trial than to show the sickness of the plaintiff, and that of his wife and children whom he was bound to support.

It appeared, upon the trial, that not only the plaintiff and his family, but the neighborhood, generally, suffered much sickness and disease, occasioned by the defendant's mill-dam, and it is insisted that this general injury is a legal bar to the recovery of individual damages.

We consider it unnecessary to determine whether the injury complained of belongs to the class of public or private nuisances, as defined by the common law. Every member of society is bound by the principles of natural justice, so to use his own property as not to injure the rights of others. If an individual erects a mill-

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dam which creates disease and sickness, he must be responsible for the consequences.

The defense set up is entirely without foundation. If a man were to sally forth into the public streets of a town, and commit an assault and battery upon every person he met, it would hardly be competent for him, in a suit by an individual for special damages, to set up as a defense that he had not only beat the plaintiff, but had also beat the whole town. Or, if a man was to poison a reservoir of water, for the supply of a city, and thereby create a general sickness among the inhabitants, it would not be seriously contended that the magnitude of the offense was a bar to a private action; or, in other words, that the defendant might exculpate himself by proving that he had not only poisoned the plaintiff, but had poisoned all the inhabitants of the city.

*There is no foundation in the objection that the civil action [378 was merged in the indictment. In England, actions of trespass or *tort*, in certain cases, were held to be merged in the felony. But this rule, it seems, did not operate after the offender was brought to justice. 1 Bac. Abr. 99; 4 Term, 333. (a)

Motion overruled.

(a) The doctrine of merger by felony, of a civil action, has no foundation in this country. 15 Mass. 338. In *assumpsit* for money received, proof that a lamb was driven to London and sold, is sufficient, unless it appear to be stolen, when *trover* would be the only proper remedy. Bull. N. P. 331.

JOHN FORD v. AUGUSTUS SKINNER AND OTHERS.

A judgment lien upon land is not discharged, against a subsequent purchaser, by the fact that chattels were once levied upon, and the levy released, by the mutual consent of the parties to the execution.

THIS was a bill of injunction, to restrain the defendants from selling certain real estate, taken in execution upon a judgment at law; and was reserved from the county of Geauga.

The case was as follows: On June 8, 1813, one Jacob French mortgaged the lands in controversy to Daniel L. Coit, for the sum

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of five hundred dollars. On November 16, 1818, French conveyed, in fee, the same premises to John Ford, the complainant, who afterward, on May 17, 1819, purchased and took an assignment of the mortgage from Coit. At the October term of the court of common pleas, in the year 1816, the then commissioners of the county of Geauga, and whose successors were made defendants in this bill, recovered a judgment against French and others, for the use of Abraham Skinner, the intestate of the defendant, Augustus Skinner, for the sum of four thousand dollars, to be discharged on the payment of one thousand eight hundred and eighty-four dollars and costs. Upon this judgment, executions issued from time to time, and small sums of money collected, until October 28, 1818, when the sheriff levied upon personal property of French, 379] *sufficient to discharge the judgment, but the same was returned by the sheriff, unsold for want of time to advertise. On December 26, 1818, a *vendi.* was issued, and on the 3d of March following, by consent of parties to the execution, the personal property thus levied upon was released, and redelivered to French. Executions were again issued, from time to time, and a considerable portion of the money made. On February 19, 1828, a *pl. fi. fa.* was issued, and the sheriff having indorsed *nulla bona*, levied upon a part of the real estate purchased by the complainant of Ford, as before stated, and thereupon this bill was filed to enjoin all further proceedings upon the execution. There was no charge that the levy upon the personal property was discharged fraudulently, or with intent to injure the complainant; but the bill contained the common charge, that the defendants combining, etc., to injure and oppress the complainant, refuse to release their lien on the land, etc.

WEBB, for complainant:

It will be seen that the principle which ought to govern in this case, is almost, or quite, the same as that of marshaling assets, or that principle, that where one creditor has two funds, out of which he may be paid, and another has but one, the creditor having the two funds shall first exhaust that of which he alone can have the control, before he shall be permitted to resort to the other. This principle is so familiar with the court, that it is deemed entirely unnecessary to cite any authorities in support of it.

I shall proceed to recite some of the leading facts in the case. It

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seems that a judgment was obtained by the former commissioners of the county of Geauga, for the use of the testator of one of the respondents, against Jacob French and Benj. Bates, Jr., which was a lien on certain lands deeded by French to the complainant, on November 14, 1818. That on the 4th day of that month, previous to the purchase of the farm by Ford, the sheriff of Geauga county returned that he had levied on a large amount of property belonging to French, by virtue of an execution founded on this judgment, which property, at a fair valuation, would *have [380 paid the judgment, or nearly so. That, in any event, there was enough, or more than enough, with a small sum of money, which had already been paid, and what was afterward collected from Bates, to have paid the judgment. That on the 16th day of November aforesaid, Ford paid French four thousand five hundred dollars for this farm. In March, 1819, the sheriff, by the direction of Skinner, releases to French this large amount of property, who received it and disposed of it as he thought was most for his interest; and after some attempt to collect this judgment from Bates at this late period, after a lapse of ten years or more, a levy is attempted to be made upon this farm. It is evident, from the testimony of King, the sheriff who made the levy, and of Seely and Graham, that the property was, at a low valuation, worth more than the debt. These men were then, and now are, all men of business, perfectly conversant with the value of property. Graham gives a particular reason why his recollection as to the value of property, at that time, is so good. It was because he came to this state that year, and had occasion to purchase articles of a similar kind for cash. Ford, it will be noted, bought this farm twelve days after he knew this large amount of property was seized; and he had no conception that it would be released; for if he had so supposed, and that it would have been effectually released, so as to have had effect upon third persons, he would never have taken a deed of the farm. Although I have said I would not cite any authorities, I shall refer the court to the following cases in support of our case. 1 Mad. 202, 493; *Hawley v. Maners*, 1 Johns. Ch. 174, 184; 19 Johns. 406; 4 Johns. Ch. 17, 20. These and other cases might be cited. They are not the same as our case, as we are purchasers at private sale, but in equity and good conscience, we are the same as if we were strictly creditors, and the cases are analogous.

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It may be further remarked, that this levy, so long as it remained, was a satisfaction of the debt to the creditor, and would have continued so to be, if it had not have been released by the creditor, with the consent of the judgment debtor. 3 Ohio, 223. And is 381] so yet, as I believe, so *far as respects my client, and all other third persons, and ever will be.

MATTOON & CARD, contra :

The doctrine of the counsel for complainant, with regard to marshaling assets, or that principle where one creditor has two funds out of which he may be paid, and another has but one, the creditor who has two funds shall first exhaust that which he alone can control, before he shall be permitted to resort to the other, is not admitted by respondent as being analogous to the circumstances of this case. Every case must be decided upon the peculiar circumstances attending it. It will be perceived by the court, that Bates and French are the joint judgment debtors, both jointly and severally liable, and their effects. The judgment was rendered November 5, 1816, and by the operation of the statute, the lands of both were incumbered by the judgment. Ford is a purchaser, and does not stand in the same relation as a judgment creditor. The statute of 1824, section 17, page 114, is broad. It provides that the execution must be levied before the expiration of one year, next after the rendition of judgment, or the judgment shall not operate as a lien on the estate of any debtor, to the prejudice of any other *bona fide* judgment creditor. This statute places a judgment creditor, in advance of a *bona fide* purchaser. There is no provision in this statute, by which any *bona fide* purchaser can divest the judgment creditors of the lien upon the real estate of the judgment creditor, although no execution be taken out. This shows that the application made of the authorities of the counsel for complainant bear no affinity to this case. The cases cited by Mr. Webb, from 19 Johns. 486, and others, seem not to warrant him in his conclusions. It is admitted that it appears by the sheriff's return, that he levied on a quantity of wheat, hay, oats, flax, and fifty sheep. It also appears by the return of the sheriff, that it was supposed that the wheat, hay, oats, flax, and sheep amounted to the quantity stated by the complainant's counsel. There is nothing definite or certain as to the amount. This property, deducting a reasonable compensation for preparing it for

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market, *and disposing of it, would not be equal to the [382 amount of the judgment. No one can believe that this property, if it had been sold under the levy, in the fall of 1818, or the spring of 1819, could have been sold for more than one half or two-thirds of its real value. There is no direct evidence to satisfy the court, that the complainant had any knowledge of the levy, at the time he took the deed. As to the amount collected from Bates, subsequent to the purchase of the land by Ford of French, it has nothing to do with the point under consideration. For if there was not sufficient property levied upon, at the time of the conveyance, the judgment can not be considered as satisfied, even upon the principles contended for by the complainant's counsel. It is believed that the principle is well settled, that where one judgment creditor has a lien on two funds, out of which he can satisfy his debt, and a subsequent creditor has a lien upon one of the funds only, the second creditor must make it appear clearly that the fund which he can not touch, is unincumbered, and sufficient to discharge the claim. In the absence of this evidence, we trust the court will not say the judgment has been satisfied from the evidence of the levy. It is not denied that a levy on personal property, sufficient to discharge the judgment, is a satisfaction, while the levy is in force, so far as it regards the judgment creditor and debtor; but it is contended that this principle does not extend to purchasers. The case cited from the Ohio Reports is one where the suit was commenced on a bond to perfect an appeal; and the levy, at the time when the suit was depending, was admitted to be in force and undisposed of; and therefore clearly distinguishable from the present suit. By the bill of complaint, it appears that Ford, if he had any relief, has a plain and adequate remedy at law. The mortgage deed from French to Coit does not interfere with the claim of the defendant. A mortgage interest, before foreclosure, is a chattel interest, and the mortgagee can not sell without a bill of foreclosure and decree of sale. 3 Johns. Ch. 129; 2 Johns. Ch. 62; Stat., p. 86, sec. 57; also, p. 231, sec. 1. The mortgage has never been foreclosed, and there is land sufficient to discharge both claims. 4 Johns. Ch. 534.

The solicitor for the complainant has observed that there was *an attempt made to levy upon the land, by virtue of an ex- [383 ecution in favor of defendant. It is claimed by the respondent, from the state of the pleadings, that the complainant can not prop-

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erly make this a point in the case. For, by the bill, he has admitted the right of Skinner, as executor, to control the judgment, and has stated that the levy was made, without complaining of any irregularity in that levy.

By the Court:

The judgment in favor of Skinner was a lien upon the real estate of French, subject, however, to the prior incumbrance of Coit's mortgage. Ford having purchased subsequent to the rendition of the judgment, took the estate, subject to the lien of the judgment, unless it was satisfied in contemplation of law, by the prior levy upon the personal estate of French.

It has been determined by this court, that a levy upon goods and chattels is a satisfaction of the judgment, while the levy is in force and undisposed of. *Cass v. Lyttleton et al.*, 3 Ohio, 223. This principle must be understood to operate, not as an actual discharge, but as a suspension of the right to enforce the judgment until the levy shall be disposed of.

In the present case, the levy upon the personal estate was set aside by mutual consent, and the property redelivered to the judgment creditor. This mutual arrangement can not affect the lien upon the real estate, at all events, as between the parties to the judgment. The parties stood in the same situation as if the levy never had been made; and the judgment creditor was at liberty again to execute the personal property, if it could be found, and if not, to prosecute his lien upon the real estate.

It necessarily follows from these principles, that the lands are liable to execution in the hands of Ford. Had the levy been discharged for fraudulent purposes, or with a design to injure Ford, the case would present an entirely different aspect. But no circumstance is disclosed from which a presumption of fraud can be raised; and the complainant, in his bill, rests his claims not upon 384] any fraud practiced in the *transaction, but upon the supposed satisfaction of the judgment. We discover nothing in the case to exempt him from the operation of the general rule, applicable to all subsequent purchasers, with notice of a prior incumbrance.

Bill dismissed.

Judge BAUSH dissented.

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ELIJAH CARTER v. NICHOLAS LONGWORTH AND OTHERS.

Where a bill to redeem mortgaged premises charges that the mortgagor fraudulently stood by and witnessed a purchaser from the mortgagee making improvements, and concealed his lien, a demurrer to such bill can not be sustained.

THIS was a suit in chancery, reserved for decision by the Supreme Court in Hamilton county.

The bill was filed in the court of common pleas, and set forth that the plaintiff, some time in 1816, purchased of one William Stewart, a certain lot of ground in Cincinnati, for the sum of *one thousand five hundred* dollars, and received from Stewart a deed of general warranty. At the time of the purchase, Stewart exhibited to the plaintiff a deed for the lot, from Longworth to himself, and assured the plaintiff that the purchase money was fully paid to Longworth. At this time the plaintiff, Longworth, and Stewart were residents of Cincinnati. The plaintiff, fully believing that the purchase money had been paid to Longworth, erected a dwelling house, and made other improvements upon the lot, to the value of *six hundred* dollars. Longworth knew that these improvements were making, yet *fraudulently concealed* from the plaintiff the fact, that, at the time, he held a mortgage on the lot for *one thousand five hundred and seventy-five* dollars, the whole amount of the purchase money due from Stewart for the lot. Some time in 1818, after these improvements were made, and before any steps were taken to foreclose the mortgage, Longworth took possession of the lot, and on November 15, 1822, sold a part of it to the defendant, Jacob Flagg, for *one thousand three hundred* dollars, and the residue to one Matthew Vandusen, for *one thousand* dollars. Vandusen afterward relinquished his part to Longworth, who is still the owner.

*The defendants, Longworth and Flagg, continued in possession and received the rents and profits, to the amount of *nine hundred* dollars, until the year 1826, when Longworth sued out a *scire facias* upon the mortgage, and upon the return of two *nilis* recovered a judgment by default for the whole amount of the purchase money, with interest, giving no credits for the rents and profits. The plaintiff was not made party to the *scire facias*.

The bill charges that Longworth extended credit to Stew-

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art—gave him a deed for the lot, and thereby enabled him to defraud the plaintiff, by inducing him to believe that the lot was paid for, when, in fact, it was not. That the plaintiff is the only person injured in the premises, and that injury was sustained by the *fraud* and *combination* of Longworth and Stewart. The bill did not state the date of the deed from Longworth to Stewart, or of the mortgage; nor did it appear that either of them were ever recorded. It did not appear that the lot had been sold under the judgment upon the *scire facias*. The deed of the plaintiff was duly recorded. Stewart is insolvent and a non-resident.

The bill contained a prayer for redemption, account, and for general relief.

The defendants, Longworth and Flagg, demurred generally to the whole bill.

The defendant, Stewart, made no defense.

The court below sustained the demurrer, and the plaintiff appealed to this court.

The decision of the court rested upon other grounds than those argued by counsel.

LONGWORTH & WORTHINGTON, in support of the demurrer.

GAINES, contra.

By the COURT:

If the defendants are bound to answer any part of the bill, the demurrer, being entire to the whole bill, must be overruled. A demurrer, bad in part, is bad *in toto*. 1 Ves. 248; 1 Atk. 450; 2 Atk. 44; Mad. Ch. 226; 1 Johns. Ch. 51; 5 Johns. Ch. 186. (a) 386] *The main question intended to be presented by the demurrer, whether a *scire facias* binds subsequent incumbrances, need not be determined. The bill charges "a fraudulent concealment of title, while the complainant was making improvement." A demurrer to such charge of fraud is bad. In the case of *Higgingbotham v. Burnet*, 5 Johns. Ch. 184, the bill charged that the party in interest stood by and saw great and costly improvements made upon the land, by persons claiming and believing themselves to be owners in fee, and never interposed any pretension of right or

(a) Contra, 2 Bibb, 484.

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title. There was a demurrer to the whole bill, which was overruled, because the charge amounted to an imposition and fraud. Here the charge of fraud is direct and positive, and must be met otherwise than by a demurrer.

Demurrer overruled.

RICHARD GATEWOOD v. THE STATE OF OHIO.

Indictment for stealing bank-bills must aver a *scienter*, or it is defective.

ERROR to the court of common pleas of Hamilton county.

Gatewood was indicted for stealing bank-bills. The indictment was founded upon section 16 of the act for the punishment of crimes, vol. xxii. 261, which provides: That if any person shall steal, etc., any bank-bills, etc., of fifty dollars, or upward, *knowing them to be such*, every person, etc.

The indictment contained no averment that the prisoner *knew* the bills stolen to be bank-bills. The prisoner was convicted and sentenced; and this writ was sued out to reverse the judgment.

STRAIT & HAWES, for the plaintiff in error:

*An indictment for an offense against the statute must, [387 with certainty and precision, charge the defendant to have committed the facts under the circumstances, and with the intent mentioned in the statute, and if any one of these ingredients be omitted, the omission is fatal on demurrer, in arrest of judgment or on error. Arch. O. L. 23, 25; Stark. C. L. 242.

The indictment, then, ought to have averred that the defendant *knew* the bills to be bank-bills.

On the statute Eliz., which makes it high treason to clip, round, or file any coin, etc., for wicked lucre or gain's sake, the indictment must charge the offense to have been committed for the sake of wicked lucre or gain. 1 Hale, 220.

The same doctrine applies to an indictment upon the black act. Leach, 556; Arch. O. L. 223.

The same principle is found in Stark. O. L. 244.

The case of *The King v. Lukes and others*, 3 Term, 537, under

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the statute 36 Geo. III., Ch. 60, sec. 2, is fully in point with the present case, and shows the indictment to be bad.

There was no argument in behalf of the state.

By the Court:

The objection taken is fatal. Where the *scienter* is part of the statutory description of the offense, it must be so laid in the indictment.

Judgment reversed.

388] *JOSEPH McDOUGAL v. WILLIAM FLEMING.

A bill of exceptions lays no foundation for reversing the judgment, unless it contains matter distinctly showing that the party taking it might have been prejudiced by the judgment excepted to.

ERROR to the court of common pleas of Hamilton county.

The plaintiff in error brought an action of *assumpsit*, in the court below, for the use and occupation of a house and lot in Cincinnati, and also on a special contract to pay rent.

The declaration contained three counts: *First*. That on May 1, 1827, the plaintiff demised the premises to the defendant, in consideration of which, and of the possession and enjoyment thereof, the defendant promised to pay three dollars per month, and that the defendant entered and has ever since enjoyed, etc. *Second*. That on November 5, 1827, the defendant promised to pay the plaintiff three dollars per month, as rent for said premises, in consideration that the plaintiff had demised the same by parol to the plaintiff, with an averment that the defendant had occupied. *Third*. General *indebitatus assumpsit* for the use and occupation of these premises. Plea—general issue with notice.

Upon the trial before the jury, the defendant, under his notice, offered in evidence the record of a judgment in an action of ejectment rendered in the Supreme Court of Hamilton county, at May term, 1829, in which McDougal was lessor of the plaintiff, and Fleming defendant, and which was brought to recover possession of the same house and lot. The demise in the declaration in eject-

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ment was laid upon October 1, 1828, for the term of twenty-one years, and the judgment was in favor of the defendant.

To this record the plaintiff objected, but it was admitted by the court, and a bill of exception taken. The verdict and judgment passed against the plaintiff, and thereupon he sued out his writ of error.

CASWELL & STARR, for the plaintiff in error.

STORER & FOX, contra.

*By the COURT:

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The party excepting must distinctly point out wherein he may have been prejudiced by the decision excepted to. *King v. Kenny*, 4 Ohio, 81, 82. In the present case, the whole evidence is not disclosed, nor any precise question raised, by the bill of exceptions. The issue, in an action of *assumpsit*, is so broad that we can suppose many situations, in which the record would be proper testimony. Inasmuch, then, as the record does not show that the court below erred, we affirm the judgment.

Judgment affirmed.

JAMES LEWIS v. THE STATE OF OHIO:

Courts can not be required to instruct a jury upon abstract propositions, but are bound to meet and decide every legal proposition that arises in a cause.

ERROR to the court of common pleas of Fairfield county.

Lewis was indicted and convicted of larceny. The indictment charged the goods stolen to be the property of Christian and William King. Upon the trial a bill of exceptions was taken, which stated, "that evidence was given, on the part of the prosecution, tending to prove that the chattels charged in the indictment to have been stolen by the prisoner, were the property of William and Christian King, and that it was feloniously taken from their warehouse." There was also evidence tending to prove that the chattels were purchased, in March last, in the name of William and Christian King; that William King at the

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time of the purchase, and for four or five years previous thereto, was, by reason of mental imbecility, incapable of making or assenting to a contract, or transacting business of any kind. There was also evidence tending to prove a partnership between William and Christian King, namely, that a sign had been for several years kept up and continued over their warehouse, or store door, on 390] which were the names of William and Christian King, and that the books of the store were kept in their names.

The arguments and evidence being closed, the counsel for the prisoner prayed the court to instruct the jury: 1. If there was not sufficient evidence to satisfy them that there was a partnership between William and Christian King, and if the property alleged to have been stolen was purchased in the names of William and Christian King, at a time when William King was incapable of contracting, that the property vested in Christian King alone, and is improperly laid in the indictment as the property of William and Christian King. 2. If the jury should find that the property described in the indictment was stolen out of a warehouse of William and Christian King, yet that circumstance is not sufficient to sustain the allegation of property in the indictment, unless William and Christian King were proved to have been carrying on business in that warehouse jointly, or that the goods were received or retained there by the joint assent of William and Christian King, at a time when William King was capable of giving his assent. These instructions the court refused to give, but charged the jury that the evidence given was, in the opinion of the court, sufficient to prove a partnership between William and Christian King.

The jury found the prisoner guilty, and judgment having passed against him, he prosecuted this writ of error.

Ewing, for the plaintiff in error:

The chattels alleged to be stolen are laid in the indictment as the property of William and Christian King. This allegation is required to be established by proof.

It seems, by what is recited in the bill of exceptions, that the prosecution attempted to establish this fact by proving: 1. A partnership between William and Christian King. 2. A purchase of the goods in their joint names. It was denied, on the part of the defendant, that the partnership was made out in evidence; and proof was adduced on his part tending to show that at the time

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of the purchase of the goods William King was, by reason of mental imbecility, incapable of contracting. The first instruction, which was asked *and refused, arose from this state of the [391 pleadings and evidence.

The question of partnership was one for the determination of the jury, not of the court. The defendant was not estopped from denying its existence; and the jury might, perhaps, have thought the proof insufficient to establish it. The court, therefore, were bound, if requested, to instruct the jury as to the law which would apply to the case, on the supposition that the point should not be sustained.

Casting the pre-existing partnership out of the case, the instructions asked were, in substance: That goods purchased in the name of A. and B., at a time when A. was incapable of contracting, vested no property in A., and that the goods could not properly be laid in an indictment as the property of A. and B. This would seem almost a self-evident position. Goods are purchased by B., or his agent, in the name of A. and B., without the assent of A. It does not make A. a partner of B. in this property, for a mutual assent is necessary to create a partnership. Watson on Part. 5. It would not vest the property in A., as a gift, for delivery and acceptance, that is, a contract to receive, is essential to the validity of a gift of chattels. 2 Kent's Com. 353-355, inclusive, and cases there cited.

Second. The second instruction asked and refused was based on the hypothesis that the jury should find the goods to have been stolen from a warehouse of William and Christian King, in which they were not carrying on business jointly, and in which the goods were not received or retained by their joint assent. And the court were asked to instruct the jury, that the goods being found by the defendant, in the warehouse, *under those circumstances*, does not, in contemplation of law, make them the goods of William and Christian King.

It will be found, on consulting the cases, that the special property in goods, which is holden sufficient to sustain trover, or an allegation of property in an indictment, is always found on the actual or legal custody. Russell on Crimes, 1132. The main fact, that these goods were in a house which was the joint property of A. and B., gave them no custody or possession of the goods, and no property in them, *either qualified or general. It had been [392 otherwise, had the goods been there in the course of a joint business

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between A. and B., or received there by their joint assent; but the terms of the exception precludes that state of things; and the refusal to instruct, if sustained at all, must be supported on the broad position that ownership of the close draws after it a custody of, or property in, any personal chattel which may chance to be placed upon it.

H. H. HUNTER, contra:

In the case two points are made for the consideration of the court, both of which, however, relate to the same thing, namely: the right of property in the goods alleged to have been stolen. The first is, whether the allegation of the indictment of property in William and Christian King, in the goods, is supported by proof of the fact that the property was purchased in the name of W. & C. King, at the time when William King was incapable of contracting, by reason of mental imbecility.

The ground of objection which would seem to be raised by the bill of exception, to the sufficiency of this proof, is this: that by reason of the purchase being made at a time when William King was incapable of assenting to a contract, the whole property vested in Christian King. We believe this position to be unsound. If William King had been of sound mind, for the same reason that the whole property is claimed to vest in Christian King, an undivided moiety would have vested in William. We ask, if this be the case, how it is possible the want of capacity in William can entitle Christian to any greater interest than he otherwise would have been? We should like to be informed of the legal principle so efficacious in its operation. We believe there is none such, and whatever may have become of the interest of William King, on account of his incapacity, Christian is not vested with it. If Christian, by the purchase, only became entitled to a moiety of the goods, admitting William to have been sane, there is no good reason that he should be entitled to the whole, on account of William's insanity. In truth, Christian would have no better right to claim [393] the interest of *William, on account of William's insanity, than would any other person, a total stranger, if you please. The most that he could claim would be possession; and this he would hold as a trustee, liable to account as such to a legally constituted representative of William, whether guardian in lunacy, heir, administrator, or other representative.

These reflections, we believe, will amply satisfy the mind that the allegation of the indictment of property, in William and Christian King, is proper, and that it would not have been proper, as claimed by the exception, to have laid it as the property of Christian alone. But notwithstanding the whole property may not have vested in Christian King, by the purchase, yet it is worthy of inquiry whether William King, by the purchase being made in his name at a time when he was insane, could acquire an ownership or interest in the goods. This inquiry may be considered as depending upon the question whether a lunatic can take property by purchase. That he can there is no doubt, both from reason and authority. It is laid down in 1 Coke, 2 b, that a man of non-sane memory may, without the consent of any other, purchase lands. If land, he certainly may goods. All the difference between lands and goods, in transferring title, consists in the form of doing it. In the case of lands it must be by deed—in that of goods it may be by parol. It is true where the purchaser, at the time of the contract, happens to be a lunatic, his contract may be rescinded on account of his lunacy; but notwithstanding this is the case, he may, at a lucid interval, confirm his contract. And until it is rescinded, it is presumed such a right of property in the goods purchased would vest in the purchaser, so as to enable him to bring *trover*, *trespass*, etc. In such case it would not be allowed to the defendant to say that the plaintiff, at the time he contracted, was of non-sane memory, and therefore not bound by his contract. Such a defense would sound strangely; it would sound equally strange in the mouth of a thief who had stolen the goods. The law will not permit the lunacy of an individual to be used to his prejudice. It is true he is not bound by his contract, but, as we have said, he may confirm it at a lucid interval. It is not absolutely void, but merely voidable. 2 Black. Com. 291. If, therefore, *Christian King, by the purchase being made in his [394 and the name of William King jointly, acquired an ownership in the goods, there is no legal objection which can be raised, on account of the lunacy of William, why he should not also have acquired an ownership; for if the principles we have first laid down be correct, had William stood alone in the purchase, right of property in the goods might lawfully have passed to him. And, as we have already remarked, the name of Christian being used with that of William should not determine William's right. The

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broadest ground in favor of the defendant below, on which the question can be placed, is to let it rest upon the inquiry whether a lunatic can acquire, during his lunacy, such right to property as will warrant the allegation of property in him in an indictment. That he can, we believe, is rendered clear from what has already been said.

We shall, therefore, leave this question growing out of the first exception. That growing out of the second is more obviously, if possible, in favor of the prosecution.

By a careful analysis of the second exception, it will be found to resolve itself into this: Whether proof that goods stolen out of a warehouse of W. and C. King, without its being also proved that W. and C. King transacted business there jointly, or that the goods had been received or retained there by the joint assent of W. and C. King, at a time when W. King was capable of assenting, is sufficient proof of ownership of the goods in W. and C. King to support the allegation of the indictment to that effect?

Two hypotheses are raised by the exception. The first is, whether it is indispensably necessary, in addition to the proof of the property being stolen from the warehouse of W. and C. King, to have also proved that W. and C. King transacted business there jointly? We deny that it was indispensably necessary, in proving property in W. and C. King, in addition to the fact of its having been stolen from their warehouse, to have proved that they transacted business there jointly. Let us suppose that the property was proved to have been bought and paid for by W. and C. King, or that they had manufactured it, or that it was theirs in any other way, and that it was actually stolen from a warehouse 395] *owned by them, would it be at all essential to prove that they transacted business in the warehouse? Why, certainly not. How, then, have the court erred in refusing to give the instruction asked in the first branch of this exception? They are asked to say to the jury that in addition to the fact of the property being stolen from the warehouse of W. and C. King, it was necessary for the prosecution to have proved that W. and C. King transacted business in that warehouse jointly. This is the abstract proposition, and we say that the court did right in refusing so to instruct the jury. For if there had been the most conclusive evidence of ownership otherwise made out, if the court had instructed the jury as required, and if the jury had strictly observed the in

struction, they must have acquitted the defendant, if there was no proof before them that W. and C. King jointly transacted business in the warehouse. Absurd and erroneous as this first branch of the exception is, the second is equally or more absurd than the first. What is it? Why the counsel for the defendant asks the court to instruct the jury that proof of the fact that the goods stolen from a warehouse of W. and C. King does not support the allegation of property in W. and C. King, unless it was also proved that the goods had been received and retained in the warehouse by the joint assent of W. and C. King, when William King was capable of assenting.

Why, in the name of common sense, attach as indispensable accompanying proof that it was necessary to be received and retained there by the joint assent of W. and C. King, at a time when William was capable of assenting? Would nothing short of this answer the purpose? Suppose that a sufficient proof of a pre-existing and undissolved partnership between W. and C. King had been given to the jury, was it necessary, in addition to that, to have proved the reception and retention of the goods, in the warehouse, by the joint assent, at a time when William King was capable of assenting? Strange idea this! If there were a subsisting partnership between William and Christian, at the time the goods were received or retained there, although William at the time may have been incapable of assenting, yet the assent of Christian would have been equivalent to their joint assent. This [396 must be the case, unless the insanity of a partner works a dissolution. If the partnership were dissolved at the time of the assent given, then, it is true, the assent of one partner does not *ipso facto* dissolve the partnership. In no instance is this the case; in some cases, however, it forms a ground upon which a court of chancery may decree a dissolution of a partnership. This is the extent. Gow on Part. 273, and the cases there referred to. It is really strange that it should be insisted upon, as it certainly is, by the bill of exceptions, that it was necessary, in addition to the fact of the goods being stolen from a warehouse of W. and C. King, to prove the particular fact of their having been received and retained there by the joint assent, etc. Would not, we ask, any other evidence but this answer the purpose? Many other species of evidence, we think, might have been resorted to, equally clear, and equally conclusive. But yet we find the counsel for the

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defendant urging it upon the court to instruct the jury that this was necessary; that without it the allegation of property in W. and C. King was not supported. Not only are the court required to say to the jury that the goods must have been received and retained by the joint assent, and this joint assent must be given at a time when William King was capable of giving his assent. Now it is, because the court have not gone the whole length in giving this instruction, that the writ of error is brought. Nothing short of the whole instruction would satisfy the demand upon the court. Yet, as we have already remarked, if there were a subsisting partnership between W. and C. King, the assent of C. King would be equivalent to their joint assent, and this, although William, at the time of the assent given, might be insane. But the instruction required did not permit the court so to lay down the law to the jury; but, on the other hand, if they had given the instruction prayed, they would have been bound to say, notwithstanding there might have been a partnership subsisting yet, if William was incapable of assenting, the assent of Christian was not equivalent to a joint assent. We submit the point to the court, which course of instruction would be the sounder in law. That there was strong and conclusive proof, if true, of the partnership, appears 397] fully by the reciting part of the *bill of exceptions. Yet that proof would clearly have been taken from the jury, if the court had given the instructions required.

Mr. LEONARD presented an argument for the state.

Mr. SWAN, one for the plaintiff in error.

By the COURT:

The court can not be called upon to charge the jury upon abstract propositions, but only those arising upon the evidence. But to refuse such instructions as properly arise in the case is error. 1 Cranch, 309, 318; 6 Wheat. 75.

By the first exception, we understand the defendant designed to contest the fact of partnership; and, for this purpose, he relied upon the legal proposition, that property purchased for a lunatic does not vest in him. The fact of partnership was material to be established by the state; and that it was material, is matter of law. The legal proposition, that the property thus purchased

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could not vest, would go far to protect the defendant, if settled in the affirmative. Upon these legal propositions, the bill of exceptions states, the court below refused to charge, but gave an expression of their opinion upon the question of fact, as to the sufficiency of the proof. We are of opinion that the court erred in refusing to charge the jury upon the legal propositions.

It is unnecessary to notice the second exception.

 JACOB WOLF v. WILLIAM POUNSFORD.

Judgment against principal and sureties upon a bond under the insolvent law; if a creditor of the insolvent would proceed upon such judgment by *sci. fa.* he must set forth and establish his debt. It is error to award execution in his favor if this is not done.

ERROR to the court of common pleas of Hamilton county.

On October 13, 1820, one John J. Richey, being in custody, at the suit of Pounsford, made his application for the benefit of the insolvent law, and executed his bond to Pounsford, with Wolf and one Gabriel Hubble as securities, conditioned to make a schedule and deliver over his property. Suit was brought upon this bond, and at December *term, 1821, a judgment [398 was rendered in favor of Pounsford against Wolf and Hubble, process being returned, *not found*, as to Richey; judgment was rendered for the sum of two thousand five hundred dollars, the penalty of the bond, to be released on the payment of *nine hundred dollars and five cents*, with *eleven dollars and twenty-nine cents* costs.

On January 22, 1829, a writ of *scire facias* was sued out in the name of William Pounsford, for the use of one Hezekiah Sanders, suggesting the death of Hubble; and after reciting that the judgment recovered by Pounsford against Wolf and Hubble, was for the sum of *nine hundred and eighteen dollars and five cents*, with *eleven dollars and twenty-nine cents* costs, called upon Wolf to show cause why said judgment should not be revived, and why Pounsford should not have execution thereon, for the use of Hezekiah

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Sanders. The *scire facias* contained no allegation that the judgment was unpaid or unreversed, or that Richey was indebted to Sanders when the bond was given, or at any other time, nor did it appear what interest Sanders had in the judgment, nor by what authority he sought to revive it.

At February term, 1829, a judgment by default was taken against Wolf, by which it was ordered that the judgment *as set forth in said scire facias* be revived, and that execution issue thereon. *Leave granted to take out execution for the claim of Hezekiah Sanders, being two hundred and eighty dollars, with interest from October 14, 1820, amounting to four hundred and twenty-one dollars and forty cents, with costs of this suit.*

HAMMOND and GARRARD, for the plaintiff in error.

STORER and FOX, contra.

By the COURT:

1. A *scire facias*, to revive a judgment, is only a continuation of the formersuit, and is not an original proceeding. 2 Tidd, 923; 1 Term, 257. When a *scire facias* is issued to revive a judgment, the whole record is before the court; and if the defendant makes 399] default, and no payments appear *upon the record, it is the duty of the court to award execution for the amount of the original judgment. 22 Stat. 68. In the present case, the original judgment was for the sum of *two thousand five hundred* dollars, and the judgment of revivor for the sum of *nine hundred and eighteen* dollars and *five cents*. The writ misrecites the original judgment, and the judgment of revivor follows the writ. This variance appears on the face of the record, and vitiates the judgment of revivor. The original judgment was not revived by the proceedings upon the *scire facias*, and the record shows no other judgment which could authorize the issuing of the writ of *scire facias*, or the judgment of revivor.

2. The original judgment was founded upon a bond, executed by Hubble and the plaintiff in error, as securities for Richey, and conditioned that Richey should make an assignment of his property for the benefit of his creditors, under the act of 1805, for the relief of insolvent debtors. It seems, from the record, and particularly from the award of execution in favor of Sanders,

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that Sanders was one of the creditors of Richey at the time the bond was executed; and that the *scire facias* was issued to enable Sanders to enforce the collection of his claims. It is unnecessary to determine in what manner Sanders might avail himself of the judgment in favor of Pounsford, to secure his debt against Richey. Admitting a *scire facias* to be the proper remedy, the nature and extent of his claims ought to be set forth in the writ with some degree of certainty. The writ contains no averment that Richey was at any time indebted to Sanders in any amount, nor does it set forth any facts from which even an inference of such indebtedness can be drawn. Writs of this description must contain everything that is required to constitute a good declaration; or, in other words, they must set out all the facts that are necessary to show a right in the plaintiff to the relief prayed for. 2 Ohio, 248. The award of execution in favor of Sanders is not warranted by any matters contained in the record, and is, consequently, erroneous.

Judgment reversed.

*PETER ROLL v. HENRY RAGUET.

[400]

An action can not be sustained upon a promissory note, the sole consideration of which is an agreement on the part of the payee not to prosecute the maker for felony.

ERROR to the court of common pleas of Hamilton county.

Henry Raguet brought a suit in the court below, against Peter Roll and Charles Roll, upon a promissory note for the sum of five hundred dollars. Charles Roll was returned by the sheriff, not found, and the declaration was filed against Peter Roll, in the common form of the payee against the maker.

The defendant, besides the general issue, pleaded in bar, that before, and at the time said note was given, Charles Roll, who was the son of the plaintiff in error, was suspected and accused by Raguet of having feloniously taken his money, goods, and chattels, in Cincinnati; that Raguet was about to institute a criminal prosecution against Charles Roll, and cause a judicial investigation to be made touching said supposed felony, and threatened Charles and Peter Roll that, unless they would pay him five hundred dol-

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lars, he would subject Charles Roll to undergo an examination before some judicial tribunal for said supposed offense, and would endeavor to cause Charles Roll to be indicted and sent to the penitentiary for the same; but at the same time promised and agreed with Charles Roll and Peter Roll, that if they would pay him five hundred dollars he would altogether desist from instituting any criminal prosecution against Charles Roll, nor would he appear before any judicial tribunal to give evidence against him for said supposed offense; but would endeavor to suppress any investigation concerning the same. That, in order to prevent a criminal prosecution against Charles Roll, and to save him from any indictment and punishment, and in consideration of said agreement on the part of Raguet, he, Peter Roll, made and delivered to Raguet the note in the declaration mentioned.

To this plea there was a general demurrer and joinder. The 401] court below sustained the demurrer and gave judgment *in favor of the defendant in error; to reverse which this writ of error was prosecuted, and the common error assigned.

CASWELL & STARR, for the plaintiff in error:

The only question for the investigation of the court is, whether the consideration of the note, as set forth in the plea, makes the note *void*, and the plea sufficient. We contend that it does; and we think the position can be most amply sustained by authority and principle.

The two following propositions are laid down in all of the books, and if they are true, they must make an end of the case:

1. All contracts, agreements, or promises, whose consideration is illegal, contrary to sound policy and good morals, are *void*.

Starkie, in his treatise on the law of evidence, says, in the words of our proposition, that, "if the consideration be illegal, or contrary to justice and sound policy, no action can be founded upon it." The maxim is invariable, that "*ex turpi causa non oritur actio*." 2 Stark. 87.

"Courts will not lend their aid to enforce a contract where the consideration is illegal or immoral." 7 Term, 601. Hence, contracts in consideration of *prostitution*, or whose effect is the encouragement of prostitution, have been holden to be *void*, because contrary to good morals. 1 Swift, 210; Cowp. 29. So, also, it has been holden that all contracts contrary to sound policy are void.

Such, for instance, as where a mechanic or physician should agree not to exercise their several professions, for a sum of money; for these contracts are injurious to the public welfare. 1 Swift, 218; 1 P. Wms. 181.

If these authorities sustain our proposition, and if that be true, an executory contract, like that under consideration, must be void. It is surely as immoral for a man to bind himself to *conceal a crime*, as to suppress the evidence of guilt; and to enforce such an agreement is as much opposed to good policy as to contract for the purpose of *prostitution*, or to discontinue a valuable trade or profession.

*Every man is morally and legally bound to take notice of [402 all violations of criminal law, and to take all proper steps to procure the conviction of the offense; or, at any rate, not to throw obstacles in the way of it. To take a *bribe*, or *the promise of one*, as "*hush money*," is surely highly immoral; and no contract to pay such bribe, or hush money, ought to be sanctioned by a court of law. These views are fully sustained by all writers on the subject of contracts, and by all courts, both in England and America, have been holden to be fundamental principles of jurisprudence.

Pothier, in his elaborate treatise on obligations, observes: "Whenever an engagement is entered into, with a view to contravene the *general policy* of the law, no form of expression can remove the *inherent defect* in the nature of the transaction. The law will investigate the real object of the contracting parties, and, if that is repugnant to the principles established for the general benefit of society, it will vitiate the most regular instrument which ingenuity can contrive." 2 Poth. Obl. 12; 2 Kent's Com. 366.

It was decided by the court of common pleas, in *Parsons v. Thompson*, that a promise by a person to pay a sum of money to another, in consideration that the latter would resign a public office which he held, and if the former should be appointed to succeed him, was *void*. Such a contract, said Lord Loughborough, is not the proper subject of an action. 1 Hen. Black. 322.

Lord Mansfield, in deciding a case similar in principle to the present, says: "The objection that a contract is immoral and illegal, sounds very ill from the mouth of a defendant; and it is not for *his sake* that the objection is allowed. But still, to permit such a defense, is *politic*." . . . "No court will lend its aid to a

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plaintiff who founds his action on an illegal or immoral act. If it appears to the court that the action arose *ex turpi causa*, they will say he has no right to ask their aid. It is upon this ground the court proceeds, and not for the sake of the defendant. *Holman v. Johnson*, Cowp. 341.

Pothier, in another part of his treatise, remarks, that, "Every transaction, the object of which is the violation of public or private duty, is void. A promise of a bribe to a *public officer, agreement to stifle a prosecution for any crime of public nature," etc. 2 Treatise on Oblig. 4.

Powell, also, in his treatise on the law of contracts, says: "All contracts having a fraudulent design in view are void, both in law and in equity." Pow. on Con. 185.

Again, he says: "A contract is unlawful, in a proper sense, if the object of it be to induce the omission of something in a person, the doing of which is a duty in the person with whom it is made." Id. 195.

So also of a contract to encourage a criminal act, as if a man bet with another he will seduce a certain woman. Id. 196.

Judge Story's pleadings contain the form of a plea similar to the one now under consideration, which he says was solemnly argued on demurrer, and sustained, taken from 7 Wentworth. Story on Plead. 125.

And the Supreme Court of New York, in an action brought on a promise made by an insolvent debtor, applying for the "benefit of the act," to one of his creditors, in consideration that he would not oppose the debtor's application, after deciding the promise to be void, says: "The promise was *illegal*. It was founded in fraud, and made for the purpose of stifling due scrutiny into the claim of the defendant to a discharge under the insolvent law." 2 Johns. 386.

In a similar case the same court says: "The consideration for the bond was illegal, and against the true interest and policy of the insolvent act." 4 Johns. 410.

Comyn, in his treatise on contracts, lays down the same principles very explicitly. He says: "All contracts or agreements, which have for their object anything which is repugnant to justice, or against the general policy of the common law, or contrary to the provisions of any statute, are void. The common law prohibits everything which is unjust, or '*contra bonos mores*.' Therefore a

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contract or agreement which is made in contravention of these general principles, is void." Com. Con. 29, 30.

On comparing these principles with the case presented in our plea, it seems impossible to restrain the conviction that they fully support its sufficiency. The plea asserts that the consideration of the note was the suppression of a felony, *and if that be [404 not illegal, immoral, or contrary to the policy of the law, we know not what is. We have shown that a promise by an insolvent debtor, in consideration of the silence of his creditor, on his application for a discharge from his debts, was illegal, because tending to the injury of the public. Can anything be more injurious to the public weal than a promise to conceal the evidence of crime?

Felonies of every description, almost, are punished by the courts of Ohio. It is of infinite importance that every citizen should feel the force of the obligation resting on him to aid in bringing felons to justice. Surely, then, this court will not say that it is not immoral, impolitic, and improper in the highest degree, for a citizen to sell his silence on every occasion where he may have been so fortunate as to have been a speculator on the commission of a felony, or lend its aid in enforcing payment of the price of such silence.

But to sustain his plea, the defendant need not rely upon the broad principle of the immorality of the consideration of the note, or of its being so much opposed to the policy of our criminal code.

There is still another general principle of law, founded perhaps upon the principles already laid down, which bears directly upon the issue, and fully sustains the sufficiency of our plea, viz:

2. That all contracts made to prevent the due course of justice, are void.

This principle, if it can be established, settles the question, and no proposition is more capable of being supported by high authority. To stipulate to conceal the evidence of guilt, conflicts immediately with the course of equal and exact justice. If this be not true, then there can be no punishment for crime, unless it chance to be associated with poverty. Whenever there is ability to purchase silence, silence will be bought, and courts will countenance such bargains and lend their aid to enforce them. But they have never yet done so, as an examination of a great many cases will abundantly show.

The promise of Raguet was to conceal the evidence of a felony from the officers of justice, and for this, Roll promised *to [405

pay him five hundred dollars. This was clearly "compounding a felony," and there is no principle of law better settled than that such a contract is wholly invalid, binding on neither party, and at the common law, was of itself a high crime and misdemeanor.

Blackstone says, that "formerly it was holden to make a man an accessory, but is now only punished with fine and imprisonment. By the ancient Gothic institutions it was liable to the most severe and infamous punishment. 4 Black. Com. 133."

And the Latin law, "*latronum similam habuit, qui furtum celare vellet, et acculte sine iudice compositionem ejus admittere.*" Stiernhede Jur. Goth., c. 3, 5.

We need not resort to analogy to support this doctrine. Our reports, ancient and modern, abound with cases in which it is recognized. On the authority of a very ancient case in 1 Leonard, Swift, Comzar, Pothier, and Powell all say, "that if A. promise B. money in consideration that B. shall not give evidence in a certain case, such contract shall not be enforced, for it is unlawful and iniquitous for a man to suppress testimony."

The case of Collins and Blantern was an action on a bond to pay money in consideration of suppressing a prosecution for perjury, and the question arose on a demurrer to a plea similar to the one now before the court. Wilson, 341.

In giving the opinion of the court, overruling the demurrer, Chief Justice Wilmot uses this emphatic language: "The manner of the transaction was to gild over and to conceal the truth, and whenever courts of law see such attempts to conceal such wicked deeds, they will brush away the cobweb varnish and show the transaction in its real colors. This is an agreement to stifle a prosecution for willful and corrupt perjury, a crime most detrimental to the commonwealth, for it is the duty of every man to prosecute and bring to justice all offenders of this sort. This is a contract to tempt a man to transgress the law and to do that which is injurious to the community. It is void by the common law, and the reason why the common law says such contracts are void, is for the public good. You shall not stipulate for iniquity. 406] *All writers agree in this, that no polluted hand shall touch the pure fountains of justice."

Swift, also, says, that, "all contracts made in consideration of compounding felonies, or crimes, are void." 1 Swift, 217.

Baily, in his treatise on bills, says: "Dropping a criminal

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prosecution or suppressing evidence thereon, is an illegal consideration." Baily on Bills, 357.

In *Swelt v. Poor*, which was an action brought on a contract of maintenance, the court say, "no principal is more clear than that a man can not build up a right on an illegal or immoral act of his own." 11 M. T. 564.

So in *Worcester v. Eaton*, where the consideration of a deed was the concealment of a theft and an agreement not to prosecute, the same court hold a similar doctrine, and recognize all the principles we have laid down. Id. 368.

In *Johnson v. Ogilbie*, the chancellor said that a bill in equity would not lie to compel the performance of an agreement to pay money in consideration of having stifled a prosecution of felony. 2 P. Wms. 277.

Chancellor Kent, in his learned lectures, adopts all of the principles for which we contend. 2 Kent, 366.

The courts of South Carolina have adjudged a case precisely in point. In *Bell v. Woods*, they say: "A note given to compound a felony is void at law, as well as in the hands of an innocent indorsee, as of the payee." 1 Bay, 249.

These authorities ought to put this question to rest. It seems from them that the positions we have taken are no novelties. Contracts of this kind, doubtless, are as old as crime itself; and if we can judge from the institutions of ancient nations, they have ever been considered violations of moral duty, opposed to the best interests of social communities, and wholly invalid and void, binding neither one party nor the other. Suppose the situation of these parties was reversed; that Raguet, notwithstanding his promise, had procured Charles Roll to be indicted, and an action had been brought by the Rolls, to recover damages against Raguet, would this court have scouted at such a suit? It would, in our opinion, have been a contempt of court in the **at-* [407] *torney* who would bring such a suit. It would be almost as strange a case as that of *Everett and Williams*, which was a bill in chancery by one highway robber against his partner, to compel an account of the profits of their business. In that case the court decided the bill *scandalous and impertinent*, and the solicitors who filed it, attached and fined. In what respect, we would ask, upon principle, are these cases different, and in what is Raguet's merit greater than that of the robber, who filed his bill on a partnership

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contract to rob and plunder on the highway, or than Roll's would have been, had they sued Raguet for a violation of his agreement? The difference in the cases is only this, that it is a less crime to conceal a felony than to commit it, a difference which, perhaps, may save him from an attachment for contempt of court, but adds nothing to the merit of his cause, or to the validity of his contract.

It is a self-evident truth, that no government, where the governed have rights, can exist long, if contracts like that between Raguet and Roll are respected by courts of law. No government can enforce its laws, if they sanction, in any shape, the doings of swindlers, cheats, or felons. Fraud, crime, and force taint everything with which they come in contact. And every contract, or agreement, tinged with the slightest shade of either, becomes an object too offensive for the eye of justice to endure. No other rule will protect the honest and moral part of mankind from the arts and violence of the wicked and corrupt. And upon these principles, courts have ever sat in judgment upon contracts of this description, as a host of authorities will show. Courts have said :

That contracts against the provisions of statutes: 4 Bun. 2225; 5 Term, 723; B. & P. 272, 551; Carth. 252; 1 Nott & McC. 211, 178; 2 Bay, 260.

Contracts, where the consideration is the commission of some crime: 17 Johns. 142; 1 Viner, 299; Bull. N. P. 146; 3 Bun. 1568.

Contracts, where the consideration is an undertaking to defame government, or persons: 3 Term, 551; 2 Term, 763; 4 Term, 166; 6 Term, 143; 1 Chan. 87; Doug. 450; 4 East, 372.

408] *Contracts to oppress third persons, or founded in oppression: 2 Bun. 925; 9 East, 416.

Contracts to induce a violation of public duty: Cro. Eliz. 230, 199; 2 Car. Law, 66.

Contracts tending to encourage unlawful acts: 3 Marsh. 433; 2 Bibb, 453.

And contracts growing out of trading with an enemy, in time of war, are void. 1 Pow. 191; Bull. N. P. 146.

The decisions in these cases have been made upon the principle, that to give effect to such contracts, impairs the benevolent operations of all laws, and furnishes a strong temptation to crime and fraud. And they show, too, that no cover however ingeniously put on, will avail, to prevent courts of justice from de-

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tecting the real motive of such proceedings. 17 Mass. 258; 2 Kent's Com. 366; 2 Peters, 529.

It may be urged here, as it was in the court below that the general principles we have laid down, on the subject of compounding felonies, apply to those cases only where prosecutions had actually been commenced. An examination of some of the cases which we have cited, shows that there is no merit in the distinction; and it is self-evident, that a rule so restrictive would furnish but a feeble protection to the property and persons of the honest and poor. 11 Mass. 368; 9 East, 49; 1 Bay, 249.

Nor is there any merit in the distinction, that there is not in this state any statute making it *criminal* to compound felonies. Burnet's opinion in *Key v. Vattier*, 1 Ohio, 144.

It is enough, that it is highly immoral and impolitic to make such an agreement. And we think that we have shown, that contracts of this kind are *contra bonos mores*, and to the general policy of our criminal laws.

Suppose, in this case, that Mr. Roll, the plaintiff in error, had gone to Mr. Raguet, and said to him, somewhat in this way: "I am told, my son has stolen your property, and that you mean to prosecute him. I am unwilling he should be exposed and punished. Now, if you will say nothing about it, and desist from all attempts at prosecution, I will give you my note for five hundred dollars." The proposition is made and accepted. (The precise case presented by the pleadings *in this suit.) Suppose, again, that an indictment had actually been found, and the trial about to come on, and Mr. Roll, apprehending that Mr. Raguet might appear as a witness against his son, had gone to him and said: "If you will not give evidence against my son, but will withdraw out of the jurisdiction of the court, so that you can not be summoned as a witness on the trial of the indictment, I will give you my note for five hundred dollars." The last proposition is made and accepted. Will it be said that any court would lend its aid to enforce a collection of the note in the one case, and not in the other, merely because an indictment had not been found; or that the guilt or innocence of the suspected son could make any difference, as to the principle of law applicable to the case? Or, that the father would be subjected to the payment of the notes, if his son was guilty, or exempt from their judgment, if innocent? In both cases, it would be an agreement, on the part of Raguet, to sell his silence; to

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take hush-money; to receive a compensation not to tell; to take a reward; indeed, to suppress evidence, touching a criminal offense. And can notes, given for such purpose, be valid and effectual in law?

The distinction attempted to be set up, is a fanciful one. It is a distinction without a difference in principle. It is unworthy an enlightened administration of justice, and receives no countenance from the books. We therefore think, that there was manifest error in the judgment of the court below, sustaining the demurrer to our plea.

In the above argument, the case of *Key v. Vattier* ought to have been cited, as settling all the principles for which we contend. Judge Burnet's opinion is conclusive on all the points we have made.

STORER, contra:

The plaintiff in error contends that the demurrer to his plea in bar, should have been overruled in the court below, and that the court erred in sustaining the same.

First. Because the matters pleaded, show that a prosecution for felony was compounded.

410] *In order to apply the doctrines of the common law, and the adjudications under the English statutes, to the present case, it will be necessary to examine the reasons on which those doctrines are founded, and to investigate the causes which produced the enactment of those statutes.

Anciently, every felony was punished with death. The tenant followed his lord into the field, and as there was no provision made for his support, he was compelled to bring into the camp his own food, as well as his weapons; hence a most rigid and severe administration of justice was induced by necessity.

To protect the property of the vassal from injury, and to prevent a resort to force in its defense, the punishment of death, in a most summary manner, was instituted. As society advanced in civilization, it was deemed impolitic to dispense at once with the severity of the ancient law, and, although the reason of the old rule had ceased, still, it was adhered to in a great variety of instances. The person attainted, or convicted of felony, as he had deprived his lord of his services, by the forfeiture of his body to the king, his blood became corrupted; he consequently died without heirs, and the lord became entitled to all the vassal's property

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by escheat. The same held as to chattels. This principle, when the relation of lord and vassal ceased, was extended to embrace the relation of king and subject, and the same consequences attached.

So rigidly was it enforced, that the forfeiture related back to the time of the offense, and avoided all intermediate alienation. 3 Bacon's Abr., title Felony, 128, and title Forfeiture, 271.

By the felonious act, then, it is found that the body and goods of the offender became forfeited to the government, and all individual control over either one or the other, on the part of the offender, was at an end.

Every act of the criminal, that prevented an inquiry into his case, was deemed a fraud upon the king; and it is said, that Lord Holt once held that a bill of sale was fraudulent as to the king, because the vendor was in Newgate, and had disposed of the goods to his son. So perfect was the forfeiture of the goods by the felon, that it was held no action would lie, by the owner of the [411] property stolen, to recover it. Hence the statute, 21 H. VIII., c. 11, was enacted, by which restitution of the goods stolen is adjudged to the true owner.

Subsequent to the passing of this act, it was held that where an appeal of robbery was brought, *trover* would not lie against the felon for the goods stolen, because the taking shall be adjudged felonious, and not merely a conversion. 6 Bac. Abr. 689, title Trover. And in latter times the English courts have held the rule thus laid down to be in full force.

In Gibson et al. v. Minet et al., 1 Blk. 569, it is said "that it is against the policy of the law to permit a party who has suffered by the crime of another to seek a remedy by a civil action." And in Master v. Miller, 4 Term, 320, Buller, Judge, says, "That where a case amounts to felony, you shall not recover against the felon in a civil action." Now the true reason for these decisions may be traced to the statute of Henry VIII., to which I have just referred.

Where the law gives restitution by the same act which convicts the offender, there is no necessity for a private action. And the pending of a civil suit, under these circumstances, might produce an unfavorable effect upon the proceedings against the criminal on the part of the commonwealth.

Previous to the passage of the act alluded to, the least in-

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terference on the part of third persons with the felon, nay, even the passive silence of any one who knew of the existence of a crime, were held to be misprisions. It is matter of curious inquiry to look into some of the cases where legal subtlety, in an age of absurd legal technicality, transformed acts, indifferent in themselves, into offenses. "It was held silently to observe the commission of a felony, without using any endeavors to apprehend the offender, is a misprision." 1 Hawk. P. C. 659, s. 2. "A man is bound to discover the crime of another to a magistrate with all possible expedition." 1 Hale P. C. 372. In this chapter Sir Matthew Hale remarks, "That by the old law, in Bracton's time, if a man knew of a treason he was bound to reveal it to the king, or 412] some of his council, within two *days, but at this time it is misprision if he reveals it not as soon as he can to some judge of the assize."

The statute of Westminster, 3 Ewd. I. Eg. is the first act upon the subject of misprision of felonies; this is confined to public offenses.

By the 3 H. VII., c. 1, the second statute that was passed, power was given to the justices of every shire to hold inquests to discover all concealments of felonies, and to punish accordingly.

From misprisions we proceed to another species of offenses, which was anciently denominated *theft bote*, but is now termed compounding a felony, which is, when the party robbed not only knows of the felon, but also takes his goods again, or other amends, upon agreement not to prosecute. 1 Hawk. P. C., c. 59, s. 5. By the statute, 18 Eliz., c. 5, s. 4, it was made criminal to compound any offense without the consent of the court.

By the statute, 4 Geo. I., c. 11, it is made felony to help a person who has stolen goods; and by 25 Geo. I., c. 36, to advertise even a reward for the return of the things stolen, the person incurs a forfeiture of fifty pounds. From the short exposition I have thus given, it appears clearly that the reasons on which the common law principle is founded are peculiar to the age and government where that law existed in its original rigor.

These reasons do not obtain in this country. It is equally apparent, I conceive, that the English statutes have been enacted either to mitigate the severity of the common law, in this respect, or to sanction, by some legislative expression, the existence of the ancient rule.

Whatever may be said as to the principle of public policy, it can not be urged that the common law or the statutes were founded upon it. They were both the result of arbitrary maxims, which became rules from necessity in the first place, and were afterward so interwoven into the system of criminal jurisprudence that it was found difficult to carry into effect the penal code of the kingdom, unless those principles were pertinaciously adhered to.

Notwithstanding the strictness with which these principles have been applied, their absurdity has been exposed, and their authority questioned by British judges.

*As in Buller's *Nisi Prius*, 131: "In *assumpsit* for money received to the plaintiff's use, proof that a lamb was driven to London and sold there by the defendant, will be sufficient unless it appear to be stolen, where *trover* would be the only proper action." And another is mentioned in Buller, "where a nurse ran off with a dead man's money, the administrator was permitted to bring an action for the amount."

In this country, the reason of the rule has ceased. Felony, or that species of it which it is alleged was attempted to be compounded in this suit, is followed by no forfeiture of life, limb, or estate.

The case of *Boardman v. Gore et al.*, 15 Mass. 331, embraces much of the discussion on the point now before the court. Judge Parker observes, "that whatever may have been the reason in which the common-law doctrine was founded, it is plain that the reason has ceased with us. In the few cases of felony which are punished with death here, it may be that the principle is still in force, so far as that the felon may not be sued in a civil action until after acquitted or pardoned.

For if convicted, he will be executed, and as felonies include a trespass, the action dies with crime. But there seems to be no reason why the injured party may not have an action for his damages, where the wrong-doer is living, and has estate sufficient to compensate the wrong.

I assume this principle, then, that before a prosecution can be said to be compounded, there must have been one commenced. It is not alleged in the pleadings that one was pending, or that any proceedings of a criminal nature had been had.

All the authorities quoted by complainant's counsel proceeded on this principle. 1 Comyn on Contracts, 28, 30, 32. The text con-

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tains the precise proposition I have presented, and the leading case of *Collins v. Blanturn*, 2 Will. 341, is quoted to sustain it. On examining this authority, it appears that an indictment had been found for perjury, and in consequence of receiving a bond for several hundred pounds, the plaintiff, who was a witness, agreed not to appear or prosecute. In a suit brought upon the bond, the 414] court very *properly decided that they would not lend their aid to enforce it.

The quotation from *Powell*, 93, is to the same point. 1 *Swift*, 237, like *Bacon's Abridgment*, embodies all the authorities referred to, with the addition of the judges' comments, but no one case is here to be found which conflicts with the principles I contend for.

In *Johnson v. Ogilby*, 3 P. Wms. 277, the chancellor expressly says, "This is a criminal prosecution, and the agreement is to stifle it;" and on referring to the reporter's account of the case, it appears an indictment had been prepared for a cheat, and just before the trial came on, it was compounded. *Evans' Notes on Pothier*, which are referred to by plaintiff's counsel, support the same position.

In *Harding et al. v. Cooper*, 1 *Starkie's N. P. Cas.*, a prosecution had been commenced against the defendant for having fraudulently obtained his discharge as a bankrupt, and a bill of indictment was found. An agreement was made by defendant's father-in-law, to give his acceptance for two shillings sixpence upon the pound, and the prosecution was abandoned in consequence; and Lord Ellenborough expressly says, in giving his opinion "that it is an agreement to drop a prosecution, and is therefore illegal." In *Waite v. Harper*, 2 *Johns.* 386, defendant agreed to give a certain sum if plaintiff would not oppose his discharge under the insolvent law; the contract was held to be fraudulent, as tending to stifle a due scrutiny into the claim of defendant to his discharge.

Bruce v. Lee et al., 4 *Johns.* 110, proceeded on the same ground, that the agreement was to stifle a scrutiny into the bankrupt's claim to a discharge.

Thus far the plaintiff in error and his authorities. Our view of the law is this: It is perhaps the moral duty of every man to inform the proper authority of all offenses that he knows have been committed; but it is not his legal duty. The sin of omission is not a crime, however strong may be the claims of society upon the conscience. No man wishes to be a public prosecutor. The odium universally attached to such a profession would forbid any hon-

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orable man to embrace it. Until, then, some public act is performed by *which the right of the public, in the development of [415 crime and the punishment of the criminal is clearly established—until an oath is made that an offense is committed, legally speaking—no prosecution is pending, and of course none can be “dropped” or “compounded.” It is clear that the owner of goods which have been stolen, should he obtain his property from the thief, by the promise that he would not prosecute him, would still be entitled to retain his property. It was his before the promise was made, and no subsequent act of his, or of the felon, could deprive him of his right.

Should, however, the felon be indicted, and the owner of the goods be the only prosecuting witness, his promise to the person would certainly prevent his testimony from being received, and the prisoner would be acquitted; still the prosecutor would have the goods.

On this principle, courts of equity have held that agreements between persons, the consideration of which was *past cohabitation*, are to be enforced. *Johnson v. Ogilby*, 3 P. Wms. 279; *Annan-dale v. Harris*, 2 P. Wms. 433.

Second. It is said, however, that the contract is void because it is against public policy. The public have an interest, I readily admit, in the reformation as well as the punishment of the guilty, and the example of public punishment is both proper and necessary.

But there is a stronger reason why a contract of the nature now excepted to should be supported than can be urged against the execution. Crime is rendered such, not unfrequently, by being made public. Reformation is, in almost any case, made hopeless by similar means. If, then, a young man who has defrauded his employer while a clerk, to a large amount, should be induced, when accused of the act, to do justice to the injured party, and, in a spirit of penitence, be willing to make amends, and to effect so desirable an object his father should join in the security, why does not public policy sanction such an agreement?

Is it immoral; is it opposed to a full or perfect control of the criminal laws of the country over the subjects of these laws? Restitution is a moral duty. A moral obligation is always held to be a good consideration to support a contract. By our statutes defining and punishing crimes, no restitution *is ordered to [416 be made on conviction. There is no judgment that the criminal shall pay to the injured party the value of the property purloined.

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If the party injured had no right to receive back his goods before conviction, the doctrines of the Goths and Vandals, whose code is referred to in 3 Kent's Com., must prevail.

The property stolen vested in the government, and thus the authority that framed the law, by an act of moral turpitude on the part of any man, became accessory to his guilt.

The party injured may forbear to prosecute. He is not compelled to inform. How, then, can the state interpose and complain of a violation of her unwritten law in compounding prosecutions, as opposing good morals?

In the absence of all statutory provisions on the subject, the rules of the common law, so far as they are consistent with our institutions, must doubtless prevail. In the application of these rules to the present case, whether the defense sought to be sustained is such a one as ought to have been made, is to be gathered from all the facts stated in the plea. It is alleged, that the father consented to become security, to prevent his son from being sent to the penitentiary. This implies guilt. In cases somewhat similarly situated the usual averment is, that the prosecution, if there was any, was groundless, and the accusation without any foundation in truth. A bond given to a person injured by an assault and battery, to make satisfaction and to prevent prosecution, was held to be legal and valid. *Price v. Summers*, 2 South. (N. J.) 578.

We have no statute by which the concealment or compounding of offenses is punishable. Our legislature have not found it necessary to enact any law on the subject, and their silence is evidence that there was no necessity for their interference. Even in England the courts have exercised a discretion in permitting the parties to compound, and this, too, without the assistance of a statute. And in Ohio, a law was passed a few years since, that on complaint before a justice of the peace, for an "assault and battery," the parties might compound on the trial, and prevent any further prosecution.

417] *In *Beeley v. Wingfield*, 11 East, 56, a note was taken by the parish officers from the defendant, who was prosecuted for a misdemeanor; the amount of the note was forty-two pounds, and the consideration the expenses of the prosecution. The note was given on the intimation of one of the justices of the sessions, that the punishment would be proportionably lighter; and this note was held

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valid by the court of King's Bench, and a similar decision, in principle, is to be found in *Baker v. Townsend*, 8 Taunton, 424.

Can it, then, be contended that it is against public policy for the injured party to receive a security for the amount of the property he has lost, where no restitution is made by statute, and no remedy by law?

Is the unfortunate person who has lost his goods to permit what the defendant's counsel contend is public policy, to take from him all right to recover, all right to secure?

If he loses his chattels he can sue the finder, but if they are stolen the felon is protected, according to the construction of those opposed to us. We do not thus reproach the law with injustice.

Dr. Paley, in his chapter on promises, at page 93 of his *Moral Philosophy*, justly remarks, "It is the performance being unlawful, and not the unlawfulness in the subject or motive of the promise which destroys its validity; therefore, a bribe after the vote is given, the wages of prostitution, the reward of any crime after the crime is committed, ought, if promised, to be paid. For the sin and mischief of this supposition is over, and will be neither more nor less for the performance of the promise." And, again, "a promise can not be deemed unlawful where it produces, when performed, no effect beyond what would have taken place had the promise never been made."

The defense in this case is a disgraceful one to the plaintiff in error. To say nothing of the father's duty, not to question his motive, or suspect his integrity, we must be satisfied he has exposed the turpitude of his son, and wishes now to defend himself under his own consciousness that it is better for his child to become morally infamous than that the parent should expend part of his fortune to conceal his obliquity. No parallel case with the present can be found in the books. Every case I have met with, [418 every case quoted by the opposite counsel, proceeds on the supposition that a suit was actually prosecuted, or an indictment or information actually pending when the composition of the offense was made.

AMES, on the same side.

By the COURT:

A father and son join in giving a promisory note, for the consid-

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eration that the payee will abstain from prosecuting the son for a larceny, and will not appear in a court of justice as a witness against him.

The court are not called upon to decide whether an action may be supported upon a promise to pay for stolen goods, nor whether an action will lie to recover private damages sustained by the commission of a public offense. The only question presented by the record is, whether a court of justice will lend its aid to enforce a promise for the payment of money, the sole consideration of which is another promise, made by the plaintiff, to conceal or stifle the prosecution of a crime, perpetrated against the peace and common good of mankind.

The well-being, the existence of every government, obviously depends, in a great measure, upon the due execution of its criminal laws. Any contract, therefore, the consideration of which is to conceal a crime, or stifle a prosecution, is necessarily repugnant to public policy; and it is a settled rule of law that all contracts, whose consideration is contrary to public policy, are void. 2 Kent Com. 366; 2 Stark. Ev. 87.

It is unnecessary to inquire whether such contracts are positively prohibited by law, or whether it is, in all cases, the legal or moral duty of an individual, cognizant of the commission of a crime, to make a disclosure to the proper authorities. Admitting the existence of cases where silence would be excusable, it by no means follows that an express contract to conceal the offense, or smother its prosecution, must be sanctioned by the law, or enforced by the judicial tribunals of the country.

419] *The objection, that when the contract was made, no suit had been commenced, or indictment found, is without foundation. The same, if not stronger reasons of public policy, exist before as after the existence of a prosecution. By a public prosecution the offender becomes notorious, and the community are put upon their guard. By a composition of the felony, in secret, without any prosecution, the true character of the offender is unknown, and the community are subjected to depredations, which might otherwise be anticipated and prevented.

As between the parties to this action the defense may not be very honest; and we may adopt the language of Lord Mansfield, (Camp. 341), "that the objection that a contract is immoral or illegal, as between plaintiff and defendant, sounds at all times very

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fill in the mouth of the defendant. It is not for his sake, however, that the objection is ever allowed; but it is founded on general principles of policy, that *ex dolo malo non oritur actio*. No court will lend its aid to a man who founds his cause of action upon an *immoral or illegal act*."

Whenever an agreement appears to be illegal, immoral, or against public policy, a court of justice leaves the parties as it finds them; if the agreement be executed, the court will not rescind it; if executory, the court will not aid in its execution.

Judgment reversed. (a)

(a) Same principle, 4 Johns. 419; 12 Johns. 306; 19 Johns. 341; 3 Cowen, 213; 11 Johns. 388; 2 Wils. 341.

*JOHN C. AVERY v. WILLIAM RUFFIN.

[420]

When the court of common pleas make an order under the statute to distribute fees between the late and present sheriff, the Supreme Court will not interfere unless a strong case of abuse is presented.

CERTIORARI to the court of common pleas of Hamilton county.

On September 4, 1823, a *fi. fa. et lev. fa.* was issued to William Ruffin, then sheriff of Hamilton county, in favor of E. Graham v. T. Graham, for five thousand four hundred and fifty-four dollars, with costs, returnable at December term, 1823. This execution was levied upon the real estate of Thomas Graham, by Ruffin.

On April 21, 1829, Ruffin's time of office, as sheriff, having expired, a *vendi. expo.* was issued to August term, 1829, directed to Avery, the then sheriff, to sell the real estate thus levied on by Ruffin, the former sheriff. Upon this writ Avery sold the land and made the money, and, at August term, 1829, the court, upon the application of Ruffin, ordered the poundage to be divided between the present and late sheriffs, in the proportion of two-thirds to the former, and one-third to the latter. To this order Avery excepted, and to quash it, sued out this *certiorari*.

STORER and FOX, for the plaintiff in *certiorari*:

We claim: 1. That the court had no power to make any distribution of the fees referred to between the former and present sheriff.

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2 and 3. That the fees for poundage belong to the officer who makes the sale, exclusively, and no part of it could be claimed by a former officer, who may have made the levy merely.

The act regulating sheriff's fees (vol. xxii. 204) provides that the sheriff shall receive "poundage on all moneys made in execution, two per cent."

In 1826 the legislature passed an act providing: "That in all cases where any sheriff or coroner, having levied any execution, and whose term of office having expired, shall have returned such execution unsatisfied, or shall have delivered the same to his successor in office, before the money could be made thereon, it shall ⁴²¹ be lawful for the Supreme *Court, or court of common pleas, etc., to order the poundage and fees, etc., to be distributed between every such sheriff or coroner, and his successor, who shall have made the money thereon, in such proportion as they shall deem just and equitable." The question involved in the present suit depends on the true construction of the act last referred to. Nothing can be gathered from the decisions of other courts to aid this court in forming a correct judgment in the present case. It is a question about which very little can be said by counsel. It is contended by counsel that the sheriff's fees are named in the fee bill, and his right to the fees depends on the actual making of the money. It is a compensation for the risk of receiving and paying over the money, no part of which is run by the old sheriff, and, of course, he ought not to receive any portion of the compensation allowed for that risk.

The court have already decided that no right exists to fees for poundage, unless the money is actually received by the sheriff. The act above referred to is evidently based on the supposition that something has been earned by the sheriff who made the levy. But the decisions of this court show that the right to any fee is not acquired by a levy. The court, therefore, might as well undertake to give the poundage to the clerk as to the old sheriff, and to a stranger as well as to the clerk or sheriff.

N. WRIGHT, contra:

On motion of Mr. Ruffin, late sheriff, the court below ordered that one-third of the poundage charged in the case stated in the bill of exceptions, be paid by the defendant, then sheriff, to Ruffin, the late sheriff. To reverse this order *certiorari* is brought. In

the case stated, Ruffin had made the levy, and had taken various steps for making the money, but Avery made the sale. Ruffin contends that he is entitled not only to one-third, but to one-half the poundage.

The original order and motion were made pursuant to the statute of February 5, 1825. About that period a law had passed requiring the sheriff, who retired from office, to transfer *all [422 executions with property under levy, into the hands of his successor, thereby changing a practice, previously common, of issuing vendies to the ex-sheriff. In such cases a division of the poundage became necessary to a fair apportionment of reward according to labor. In our law poundage is given nominally for making the money; but, in making the money, many preparatory steps are necessary, which are all properly included in the labor of making the money, and should be compensated as such. There is no fee for searching out the property, for the hazard of seizing and keeping it, for the offering the property for sale, for the risk the sheriff runs of liability for trespass in these proceedings, or for sundry other services attending the protracted proceedings often attending levies on land. To compensate for all this, poundage is given, not accruing, to be sure, unless the money is actually made; but when it does accrue, obviously standing as a recompense for all the unfeared services necessarily attending the making of the money. If the money is made by a sale of land, the levy is as much a part of the labor by which the money is made, as the receipt of the money itself. Hence, the legislature directed in the statute above cited, that when a sheriff should make a levy and his term of office expire, the court might order such distribution of poundage between such sheriff and his successor as they might deem just and equitable. This statute provides for the exact case in question, and seems to me to settle the matter of right.

It has been argued that, as this court have decided that poundage is given only for the actual making or receiving of the money, that the ex-sheriff has had no part in receiving the money, and, therefore, it is not equitable that he should receive any part of the compensation.

But this decision applies only to the question when poundage is taxable; it is obvious that by the statute regulating fees, there may be many cases when poundage, or some part of it, might be justly and equitably due, although not legally so. The law deals

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in generalities, and so fixes a general rule, which, if it operates harshly in some cases, makes compensation by a different operation in others. The rule must, of course, be fixed, and somewhat 423] arbitrary to avoid the *possibility of abuse. But that rule has nothing to do with the equity of the two sheriffs, arising out of the labor they may have respectively contributed toward making the money. Our statute fixes the case in which poundage is taxable, but does not fix the class of services for which it shall be considered a reward.

The statute of 1825 surely settles all these queries, for it is nugatory entirely, unless it applies to poundage, and contemplates a division of it between the two sheriffs. The other fees, taxed by the ex-sheriff for specific services, could never be a subject of distribution. The sheriff who performs must have the pay. The statute, therefore, would be nullified if poundage can not be divided. There is no sheriff in the state who does not feel the injustice of toiling for years with levies and attempts to sell, and losing all the poundage, because on the eve of a sale, or, perhaps, even after a sale, the execution must be turned over to his successor.

In the present case it is obvious that Ruffin's share of the labor was half, at least, and he insists that the allowance to him should have been half. One object of the parties is, to fix some rule by which successive sheriffs may be guided. A general rule of one-half would, undoubtedly, operate more justly than any other, and as both parties excepted in this case, it is claimed, on the part of Ruffin, that the judgment below shall be corrected by awarding to him the half of the poundage, if that can be done.

By the COURT:

At common law, an execution partly executed by a sheriff shall be completed by him after the expiration of his term of office; but by statute, vol. xxii. 201, sec. 8, he is directed to transfer all executions to his successor; and it is further provided, by the same statute, that no *vendi. expo.* shall be directed to, or executed by a sheriff whose term of office has expired.

By the statute of 1825, vol. xxiii. sec. 18, power is given to the Supreme Court or court of common pleas to order *poundage and* 424] *fees taxed* to be distributed between the sheriff and his *successor, in such manner and proportion as they may deem just and

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equitable. The power to make the order in question was vested in the court of common pleas; and wherever that court has used its discretion in the exercise of that power, a strong case of its abuse must be presented to induce this court to interfere on *certiorari*. Let the order be affirmed.

DAVID RANDALL v. JOHN PRYOR.

The statutory provision that a decree for a deed may be made operate as a conveyance does not take away the jurisdiction of the court to enforce the execution of a conveyance by process of attachment.

MOTION to discharge a rule taken upon the defendant to show cause why process of contempt should not be issued against him; and was adjourned for decision from the county of Belmont.

It appeared, that at the October term of this court, 1829, a final decree, in chancery, was rendered against Pryor, and in favor of Randall, by which, among other things, it was decreed that Pryor, within thirty days thereafter, should execute and deposit with the clerk, for the benefit of Randall, a deed of release in fee simple, for certain lands, with covenants of special warranty. Pryor having neglected and refused to comply with this decree, a rule was taken upon him at the May term of this court, 1830, to show cause why an attachment should not issue against him for contempt. Upon this rule Pryor appeared and submitted the present motion.

There was no argument in favor of the motion.

HUBBARD and JOHNSTON, contra:

1. The court have so decreed.
2. By a specific execution of the decree, Randall would have a conveyance which could, without question, be admitted to record, and by which, in due form of law, *notice should be given [425 to the world of his title. Rev. Code, 283.
3. Randall must otherwise incur the expense of the chancery record.
4. Randall, upon a failure of title, would have a more beneficial and direct remedy upon the covenants.

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5. Randall has a right to the performance of the decree, and the court having the power, will, in respect of its own dignity, enforce the decree. Const., art. 3, sec. 1; Rev. Code, 15, secs. 1, 2, 40, 42; 1 New Prac., ch. 3, sec. 1; Harrison Ch. 199, 201.

By the Court:

There is no doubt of the general power of the court, to enforce its decrees by attachment. The statute, vol. xxii. 80, sec. 40, gives this power in so many words. The only question is, whether the legislative provision, making a decree for the conveyance operate *per se*, as a conveyance, does not take away the power of the court to enforce the specific execution of such a decree by attachment.

It was not the intention of the legislature to discharge the party, against whom such a decree might be rendered, from the actual execution of the deed. The provision was not intended for the benefit of the party, who had agreed to execute a conveyance, and who, by neglect or refusal, compelled the other party to resort to a court of equity for a specific performance. The object of the legislature was, to furnish an adequate remedy, in that class of cases, where the proceedings were *in rem*, and where the court could not enforce personal obedience to its decrees, for want of jurisdiction over the person. It is true that the provision in question embraces all cases where a decree for a conveyance is rendered; but the party has an option, either to rely upon the decree, as a conveyance, by act and operation of law, or to enforce the actual execution of a deed, where the person of the defendant is within the jurisdiction of the court.

Whether in the event of a failure of title, the remedy of a grantee would not be more plain and simple upon a deed with covenants, than upon a decree, the court do not intend to intimate 426] an opinion. The general power of the court to enforce its decrees, is not limited by any statutory provisions; and we see no reason, in this case, why it should not be exercised.

Motion to discharge is overruled.

ROBERT FULTON v. WILLIAM MONAHAN.

Where defendant justifies breaking plaintiff's close and carrying away stone, under the act of Congress for constructing the National road, the plea must aver and set forth the facts that constitute the necessity for such an invasion of private right, or it is bad.

THIS was an action of trespass, *quare clausum fregit*, and was reserved from the county of Muskingum.

The defendant *justified*, under the act of Congress, passed May 15, 1820, and March 3, 1825, establishing a National road through the State of Ohio, and, in his plea of justification, alleged, that the National road had been laid out, near the close in which, etc.; and that, in the construction of said road, it was necessary to make use of certain limestone, within the close in which, etc.; and that the defendant, as the servant, and under the direction and authority of the government of the United States, broke and entered said close, and took, and carried away said limestone, and used the same, in the construction of said road, and for no other purpose.

To this plea, the defendant demurred generally.

ADAMS and STILLWELL, in support of the demurrer.

CULBERTSON, contra.

By the COURT :

The plea does not set forth, with sufficient certainty, the authority under which the defendant professes to have acted. The government necessarily acts by its officers; and whenever an individual undertakes to justify a trespass, under the authority of government, that authority must be traced to some officer of the government, known and recognized by law as such.

*The defendant, however, in this case seems to have rested his [427] defense principally upon the grounds that the National road had been located near the plaintiff's close, and that stone were necessary in the construction of that road. Admitting these grounds, it by no means follows that it was necessary to use the plaintiff's stone. If he chose to rest his defense upon the necessity of using

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the plaintiff's stone, he ought to have set forth the facts, that the court might judge of the necessity, A man may justify going over another's ground, by reason that the common highway is found-erous, or out of repair; but, in his plea of justification, it is not enough to say, that it was necessary for him to go upon the ad-jacent land, but he must allege specially, that the highway was out of repair, or found-erous. Doug. 747; 1 Saund. 298; 1. Story's Pl. 607.

Demurrer sustained.

THE TOWN OF MARIETTA v. HENRY FEARING.

Incorporated towns within this state can not subject stray animals, owned by persons not residents of such towns, to their corporation ordinances.

ERROR to the court of common pleas of Washington county.

An action of debt was commenced before the mayor of the town of Marietta, to recover a penalty for the violation of an ordinance of said town, to restrain horses from running at large. From the decision of the mayor, the defendant in error appealed to the court of common pleas. The plaintiffs in error set forth, in their declaration, their charter of incorporation, by which, among other things, it appeared that they were authorized and empow-ered to establish such ordinances and laws, with such penalties annexed, as to them might seem proper and necessary, for the health, safety, cleanliness, convenience, morals, and good govern-ment of said town, and the inhabitants thereof; and to cause the streets and commons of said town to be kept open and in repair, 428] and free from every kind of nuisance, and to require *and compel the abatement of all nuisances within the corporation: Provided, all such ordinances and laws should be consistent with the constitution and laws of this state and of the United States. Under these powers, the plaintiffs, on April 7, 1825, established an ordinance, by which it was declared to be unlawful for any horse to be suffered to run at large on the streets, commons, or vacant or uninclosed lots, within said town, between the 10th of April and the 1st of December of each and every year; and that if the owner or keeper of any horse, mare, etc., should suffer the same to run at large, contrary to the provisions of this ordinance,

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the person or persons so offending should forfeit and pay, for the use of said town, a sum not exceeding two dollars for each offense, to be recovered before the mayor. This ordinance was duly published. The defendant, disregarding said ordinance, permitted his two mares and one colt to run at large, on the streets and commons of said town, during the time prohibited in said ordinance.

To this declaration, the defendant pleaded, that before and at the time when, etc., the defendant did not reside within the limits of the town of Marietta, but resided upon a tract of land adjoining said town, and through which tract of lands, there run a public highway, leading from said town of Marietta to the town of Bel-pre; and between which and the commons of said town of Marietta, there was no fence or barrier; and that at the time when, etc., the defendant turned said two mares and colt from his fields, part of said tract of land, into the said highway, whence the said mares and colt, without any other permission of the defendant, strayed upon the commons, in the declaration mentioned, and remained there without the defendant's knowledge, which is the same running at large complained of, etc.

To this plea, the plaintiffs demurred generally. The court below overruled the demurrer, and gave judgment for the defendant, to reverse which, this writ was prosecuted, and the common error assigned.

*N~~Y~~E, for plaintiff in error:

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Aggregate civil corporations are distinguished, generally, into public and private. To the last, the power of making reasonable by-laws, for the good government and benefit of the place, is, from the very nature and purpose of their being, incident. 4 Wheat. 668; 1 Salk. 142; 2 Bac. Ab. 8; 1 Bac. Ab. 545, 546, 550; 1 Cowp. 270.

It has been said, by high authority, that the whole government of the country is a series of corporations. Hence, it is said that a by-law may be *præter* the general law, though not *contra*. 1 Bac. Ab. 651.

As civil communities, for political purposes, there are attached, in a qualified degree, to public corporations, the rights of domain and security, and those which flow from them. These rights and immunities, whether ample or limited, are, in this respect, perfect;

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and are no more legally exposed to infraction, with impunity, by strangers than citizens. 2 Vattel, ch. 4, sec. 49.

Strangers coming into a corporation must, at their peril, take notice of the by-laws of such corporation. 1 Bac. Ab. 550; Skin. 350, pl. 19; Lutw. 404.

It is not necessary to set forth in a by-law, the reasons for its enactment. Carth. 482; 1 Bac. Ab. 545; 3 Burr. 1838.

The defendant was bound to take notice of the law of the corporation, and having knowingly and voluntarily permitted his horses to run and remain at large within its jurisdiction, he is liable to the penalty inflicted by that law.

H. STANBERRY submitted an argument on the other side.

GODDARD, contra :

The question of law supposed to be raised by the plaintiff's demurrer, to the defendant's *amended* pleas, is this :

Has the corporation of the town of Marietta power to fine a stranger, owning lands contiguous to said town, whose horse, lawfully grazing on his own land, strays into said town; between which and the land of said stranger, there is no barrier? This is 430] the substance of this dispute. If stated **too narrowly*, a recurrence to the plea will correct this error.

The defense to this action is founded mainly on section 12 of the act relating to stray animals. Vol. xxii. 359. I think it will be conceded that this statute would effectually prevent the town of Marietta from *taking up* Paul Fearing's old mare (who has run on these commons from the time whereof man's memory runneth not), except as a stray, and in the manner pointed out by the stray act. Indeed, such was the decision of this court in the case of David Putnam's sheep, which induced the town of Marietta so to alter that law, as to take away its operation *in rem*, and seek to enforce it in *personam*. I claim that their present ordinance is repugnant to the spirit of our public statutes.

It is proper here to inquire into the true intent and meaning, reason and spirit, of section 12 of the stray act, and of the "act defining a lawful fence," etc.—p. 240. The common law doctrine upon the subject of a close, surrounded by an ideal, invisible fence, leads to consequences wholly irreconcilable with the use and enjoyment of real estate, in a new, sparsely settled country. Take

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this case for illustration. It has been decided that the owner of land over which a road runs may maintain an action of trespass against his neighbor, whose cow grazes by the side of the road. Adhere to the common law doctrine, and this court must decide that hogs eating mast in the woods subject their owner to an action, or to a thousand actions, in favor of the owner of the soil, an injury not remedied by section 58 of the judiciary act, relative to tender of awards. The provisions of the two first statutes to which I have called the attention of the court, are intended to modify the common law in this respect.

I hold that the "act defining a lawful fence," etc., provides, in effect, what shall be a close; and that no action will lie, for an injury done to land by the animals there named, unless the land be inclosed by the kind of fence there defined to be "lawful." This act, by implication, proclaims it to be lawful for the animals of A. to graze on the land of B., which is *in fact* uninclosed.

Some further legislation was, however, thought necessary. The legislature were in the habit of incorporating *towns, giving [431] them extensive powers; and it was desirable that those powers should not be so construed as to interfere with the sound principles of public policy, which the legislature had adopted. They had already, as I have argued, pronounced it lawful for a man's animals to graze on another's uninclosed land. While doing so, they might stray into a corporate town; and it was necessary, in pursuance of the same policy, to guard the owner from the vexatious operation of town ordinances. Section 12 of the stray act was intended to effect this object; and when we have learned the intention of the law-maker, we have that, rather than the words, to guide us. This section, it is true, in terms only, prohibits towns from "taking up and dealing with" animals; but is any one so blind as not to see, that enforcing a penalty against the owner of the animal is the same thing? I only ask for the application of the common rules laid down for the construction of statutes.

By the COURT:

It is a general rule of law, that strangers, as well as citizens, are bound by the ordinances and by-laws of a corporation. Strangers visiting a country are bound by the laws of its sovereign. 1 Vattel, ch. 4, sec. 49. Strangers coming into a corporation must, at their peril, take notice of the by-laws of such cor-

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poration. 1 Bac. Ab. 550; 1 Cow. 269. A by-law of a city is binding upon strangers coming within the territorial limits of the city. 6 Pick. 187. These principles prevail in all well-organized governments, and the experience of ages has proved their practical utility.

But do these principles apply to the present case? The statute concerning stray animals, vol. xxii. 343, after pointing out the mode in which animals running at large may be taken up and disposed of, provides, "that nothing in the act for the incorporation of towns, and nothing in any special act for the incorporation of any town or village in this state, shall be so construed as to authorize the making of any by-laws or ordinances, or to enforce the same, of any such town or village, which shall subject any animals, the property of any person not residing within the limits 432] of such town or village, *to be taken up and dealt with in any other manner than is provided for in this act." We consider this a decisive expression of the legislative will upon this subject; and it was intended to subject non-resident owners of animals to no further liabilities for strays than those imposed by the act. It removes no difficulty to say, that the ordinance of the town of Marietta operates, not on the animals, but on the owner, in the shape of a penalty. It infringes the spirit of the law, and is repugnant to its policy. That can not be done indirectly which the law prohibits to be done directly. An ordinance of an inferior corporation, in violation of a public statute, is necessarily void.

But this statute was passed after the town of Marietta was incorporated, and it is to be inquired, whether it is competent for the legislature to modify or restrict its charter without its consent. In this respect there seems to be a well-settled distinction between private and public corporations. In the case of Dartmouth College v. Woodward, 4 Wheat. 518, the Supreme Court of the United States held, that a private corporation is a contract between the government and the corporation, and the legislature can not repeal, impair, or alter the rights and privileges conferred by the charter, against the consent, and without the default of the corporation, judicially ascertained and declared. But a public corporation, created for the purposes of government, can not be considered as a contract. We adopt the rule laid down by the late Chancellor Kent upon this subject. 2 Kent's Com. 245. "In respect to public corporations, which exist only for public purposes,

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as counties, cities, and towns, the legislature, under proper limitations, have a right to change, modify, enlarge, or restrain them, securing, however, the property, for the uses of those for whom it was purchased."

Upon the whole, we are of opinion that the legislature reserved the power to prohibit corporations from interfering with animals running at large, where the owners are non-residents of the corporation; and that this power was virtually exercised by the passage of the statute.

Demurrer overruled.

*JAMES MILLER v. JOHN A. FULTON AND OTHERS. [433

Where a tenant is in actual possession of a water grist-mill, and of the lands adjoining, on a contract indefinite as to time, and on a rent of a portion of the proceeds of the mill, the landlord can not maintain trespass against a stranger for destroying the mill-dam.

THIS was an action of trespass *quare clausum fregit*, for tearing down the plaintiff's mill-dam, situated on the Scioto river, in the county of Ross. A verdict was found for the plaintiff, under the plea of the general issue, in the Supreme Court, and a motion for a new trial was submitted, and reserved for the decision of this court. Numerous questions were presented by the record, but the opinion of this court was limited to the question of the plaintiff's possession of the *locus in quo*; the statement of facts is, therefore, confined to the same point.

John Cutright, a witness for the plaintiff, stated that at the time the trespass was committed, and for several years before, the complainant was the owner of, and in possession of a small tract of land, situated on and bounded by the western bank of the Scioto river, in Ross county, on which tract of land there was a water mill, a small dwelling house, and a corn house; that no part of the tract had ever been tilled or cultivated; that some ten or twelve years previous, a dam had been erected from the mill across the river, and which abutted against the eastern bank of the river, on a tract of land formerly owned by one Hough, who also had a mill supplied from the same dam. The breach in the dam, for which this suit was brought, was between the east bank and

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the center of the river. That for two or three years prior, the plaintiff had repaired the whole dam every spring. That he, the witness, at the time the breach was made in the dam, was running the plaintiff's mill, as his miller, and he and his family occupied the dwelling house and the corn house, situate on the mill tract, near the plaintiff's mill. That he, Cutright, hired hands to assist him in running the mill, and paid them out of the proceeds of the mill. That he provided lights for the mill, and was not bound to grind for the plaintiff more than for other persons. That he had the entire management of the mill, as a miller, to work her; that he had a right to do as he wished with her; he used the tract of 434] land on which the mill stood, or a part thereof, for *pasturage; that he was to retain one-third of the proceeds of the mill for his services, as miller, etc., and give the plaintiff two-thirds; and that no time had been fixed for the termination of the contract between himself and the plaintiff.

Joseph Hawkes also testified that Cutright and one Veal were in possession of the mill, at or about the time of the trespass.

It was admitted that at the time of the trespass, the plaintiff resided in the town of Chillicothe, one or two miles from the mill.

KING, ALLEN, and LEONARD, for the motion.

MURPHY and G. SWAN, against it.

By the COURT:

The evidence in this case proves beyond a doubt that Cutright was a tenant of the plaintiff, and had the possession *in fact* of the premises at the time the trespass complained of was committed. A special contract had been entered into, by which Cutright was bound to pay to the plaintiff two-thirds of the proceeds of the mill. Under this contract, Cutright took actual possession of the mill and its appurtenances, and employed and paid his own laborers, in conducting the business of the mill. The same relation of landlord and tenant existed between Cutright and the plaintiff, as between any other tenant who is bound to yield one-third of the crop, and the owner of the soil.

It is no longer an open question, whether trespass *quare clausum fregit* can be supported by the lessor, for a wrong done by a

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stranger, while the tenant has the actual possession. 1 Chitty's Pl. 161; 1 Johns. 511; 3 Serg. & Rawle, 514.

New trial granted.

*JOHN DOE, EX DEM. DAVID GWYNNE, v. RICHARD ROE. [435

THE SAME, EX DEM. GEORGE MORRIS, v. THE SAME.

Where landlord proposes to be made defendant in ejectment, and tenants for years under him do not, plaintiff can not insist upon joining the tenants.

THESE actions were brought in the Supreme Court of Hamilton county to recover the possession of certain lots in the city of Cincinnati.

Declarations were duly served upon the tenants in possession. At the appearance term, William Harmer and others, heirs at law of Josiah Harmer, moved the court to be made defendants in the place of the casual ejectors; and, at the same time, presented a petition to remove the causes to the next Circuit Court of the United States for the district of Ohio.

It appeared that the value of the premises in question was greater than five hundred dollars, exclusive of costs; that the lessors of the plaintiffs were residents of the State of Ohio; that the persons upon whom the declarations were served were tenants for years under the said William Harmer and others, who were owners of the fee, and bound by their covenants to sustain their said tenants in the quiet possession of the premises; and that the said William Harmer and others are citizens and residents of the Commonwealth of Pennsylvania. Bonds with security were entered in pursuance of the act of Congress. Vol. ii. 60.

The decision of these motions were reserved for the special session.

CASWELL and STARR, for the motion:

We understand the plaintiffs to contend that they have a right to insist that the tenants shall be made defendants *with* the landlords, and having thus made the tenants parties to the record, the federal court will be ousted of its jurisdiction, inasmuch as all the parties will not, in that event, be competent to sue in that court.

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The plaintiffs concede that unless they have a right to insist upon the tenants being made parties, that the present defendants have a right to remove their causes for trial to the Circuit Court of the United States.

436] *They, however, contend that the court, in the exercise of its discretion, can interpose such parties as shall, in effect, defeat the operation of our own statute and the act of Congress. This position, as it is sought to be applied, we utterly deny. We say that the rights of those who apply to be made defendants, and remove their cause for trial to the circuit court, are matters of positive legislation.

The court, in examining this question, will constantly bear in mind that these applications were made by the owners of the fee, and not by the tenants.

The heirs of General Harmer, having acquired the property in controversy by descent from their ancestor, ask the court to permit them to defend their title, in the place of the casual ejector. This granted, they ask that their cause may be tried in the federal court, because they are citizens of the State of Pennsylvania, and the plaintiffs are citizens of the State of Ohio. Have they a right thus to defend their title and possession? We think they have. Section 59 of the practice act (22 Ohio L. 60) provides: "That no plaintiff shall proceed in ejectment, and recover any lands or tenements against any casual ejector, without ten days' notice being given to tenant in possession (if any there be)—and it shall be lawful for the court, on application for that purpose, to make the tenant, or landlord, or both, or any other person claiming title to the premises, defendant in the place of the casual ejector." Section 60 of the same act provides: "That the plaintiff, on affidavit of the delivery of the declaration of ejectment, shall have judgment against the casual ejector, unless the tenant in possession, or landlord, or some other person, *shall apply* to be made defendant, and enter into the common consent rule, within the term to which the tenant had notice to appear."

According to the provision of this statute, the tenant in possession had a right, when suit was brought, to appear and make an application to defend his possession, under the title of his landlord, and the court having satisfactory evidence that he was a tenant in possession, would be bound to admit him as a defendant.

437] *If he does not choose to appear, he may give notice to his

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landlord of the pendency of the suit, and call upon him to defend his possession.

If the court are satisfied that he has a claim to the property, and he applies to defend that right and the possession of his tenant, they are bound to permit him to do so, and any other person claiming title to the premises has a right to demand that a judgment shall not be entered against the casual ejector without a trial of the right of the plaintiff to the possession of the property for which the suit is brought.

In the cases before the court the tenants do not apply to be made defendants, but relying upon their covenants for quiet and peaceable possession, they give notice to their landlord, as they were bound to do, and *they* appear at the bars of the court, and showing their interest, ask to be made defendants upon the usual terms. Under these circumstances, is it competent for the court to enter a judgment by default against the casual ejector? The petitioners in this case have adopted the usual mode of proving their interest.

They have made oath that they are the owners, in fee, of the premises, and are in possession by their tenants, whose possession they are bound by their covenants to defend.

They have in all things complied with the provisions of the act of Congress authorizing them to remove the causes. This point is not disputed.

The defendants insist that the court have no power to *compel* the tenant or any other person to make himself a defendant—that there is no process known to the law which will compel the tenant to appear, and the landlord can not substitute the name of the tenant for that of the casual ejector, and subject him to costs without his consent; and if he should so enter it, the tenant might apply to the court and have it stricken out. If no person will appear and make himself a defendant, within the provisions of the statute and the practice of the courts, it is the duty of the court to render judgment by default against the casual ejector. This is the utmost limit of the power of the court. Can this power be exercised, consistent with the law, where the owner of the *fee appears, complies with the provisions of the law, [438 and asks to defend his title?

We think the statute too plain to admit of any reasonable doubt, and if we resort to the common law and the practice of the

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courts, we shall find that the right of the landlord thus to defend his possession has been uniformly sustained.

I have already observed that the defendants are strictly within the terms of the act of Congress, and have complied with all its conditions. It is not deemed necessary to recite the act; it will be found in 2 Laws of the United States, 60.

We admit, to establish our right to remove these causes into the federal court, we must show that all the defendants have a right to be heard in that court.

If the interests of the defendants be joint, all must have a right to sue or defend in that court, or the cause can not be removed from the state court. This position is fully established in the following cases: 3 Cranch, 267; 1 Wheaton, 91; 5 Cranch, 303; 8 Wheat. 451, 1 Paine, 410; 1 Dunlap's Prac. 232; 1 Kent's Com. 324.

But we contend there is not, from necessity, any joint interest between landlord and tenant. They may or may not both be interested to retain the possession. There is no unity of interest within the meaning of the law.

In order to be within its spirit and meaning, their interests must be such that the one can not sue or defend without the other. No such interest exists between landlord and tenant. They may unite in their defense or not, at their pleasure.

It is contended by the plaintiffs that after they shall have recovered in their action of ejectment, they can not recover the *mesne* profits of the non-resident landlord, and therefore they have a right to insist that the tenants shall be made defendants. *Non sequiter*.

Suppose neither the landlord nor tenant appears to defend, and judgment is taken against the casual ejector, how will the plaintiff recover the *mesne* profits then?

The learned gentlemen who oppose these applications are too deeply versed in actions of this kind not to know that after a writ 439] of possession is executed they can maintain *their action of trespass, and recover the *mesne* profits of any person who has been in possession of the premises.

It is not necessary that the tenant should be made a defendant, in order to enable them to recover from him the *mesne* profits, and any damage sustained by waste.

The only difference which would exist between the case of a

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judgment, by default, against the casual ejector, and the judgment on trial, where the tenant is made a defendant, would be in the proof necessary to sustain the action of trespass.

In the one case, the record would prove it, for all the time covered by the declaration in ejectment, and in the other, the plaintiff would be compelled to prove that the defendant in the action of trespass had been in possession.

But the right of these petitioners is not to be defeated in order to save the plaintiffs the trouble of making that proof. The court have no discretion upon this subject. As we have before observed, the rights of these defendants, if they have any, are the result of positive legislation.

If the reasoning of the plaintiff's counsel be correct, a non-resident proprietor can never try his cause in the federal courts without first abandoning his possession.

If he put a tenant upon the premises, he can not have the aid of the federal court to sustain his title.

Of what value would a recovery be to him in the federal court? He brings his suit as he has a right to do (being out of possession), in the federal court. He establishes his title; a writ of possession issues; he is put in possession under it; he then leases his land to tenants. His opponent then brings suit in the state court to regain that possession. He serves *his* declaration and notice upon the tenants. The landlord can not defend in the federal court because, forsooth, he did not abandon the possession awarded to him by the federal court. The state court is unfavorable to his claim, and renders a judgment against the casual ejector, because the tenant does not choose to defend, and they will not admit the landlord to appear without him; and thus the means used by him to render his title secure, and his former recovery valuable, are made the ground of defeat by the state court.

*We have as much confidence in, and are as justly proud [440 of the independence of our state tribunals, as our learned opponents.

But we can not surrender the rights of our clients without a struggle. We think it as much the duty of the state courts to surrender their jurisdiction to the federal tribunals, in those cases clearly provided for by the law and the constitution, as it is to exercise it in cases within their own jurisdiction.

If we are correct in the construction we have given to the laws of Congress and of the state, the court will accept the bond and

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order the causes to be removed for trial to the next Circuit Court of the United States for the district of Ohio.

C. HAMMOND, contra :

These cases present for the consideration of the court a single question, which is thought by the plaintiffs' counsel to stand free from any difficulty. Both cases involve the same point. The lessors of the plaintiffs claim, in separate rights, certain property, upon which the tenants in possession have leases for a term of years. Aaron Valentine for a term of ten years, Duncan McCollom for the term of ten years, Jedediah Banks for the term of ten years, and J. U. Phillips for the term of ten years. Each of these leases are for separate parcels of the land in controversy.

Josiah Harmer and others, purporting to be the lessors in these leases, come into court upon the return of the ejectments, and move to be admitted defendants, in place of the casual ejectors, and claim to be so admitted, exclusive of the lessees' tenants in possession. The Harmers are citizens of the State of Pennsylvania, and with their motion to be admitted sole defendants, they prefer a petition to remove the causes to the Circuit Court of the United States. The question for decision is, have the applicants a right to be admitted exclusive defendants, under the circumstances of the case?

The laws of Ohio, vol. xxii. 62, sec. 59, provides that "it shall be lawful for the court, on application for that purpose, to make the [441] tenant, or landlord, or both, or any other person *claiming title to the premises, defendant, in the place of the casual ejector." This law submits the question of admitting defendants to the sound discretion of the court. What is a legitimate exercise of that sound discretion in this case?

The object of the applicants is, by being admitted sole defendants, to oust this court of jurisdiction, and take the cause to a tribunal of their own preference. The first consequence of indulging them is, that the plaintiffs, supposing them to recover, are compelled to look to the applicants for their mesne profits, instead of the parties in actual possession. The plaintiffs claim that the court ought not to compel them to accept of any responsibility for mesne profits which substitutes others for the tenants in possession, to whom they might prefer to resort. They claim, further, that the court ought not to compel them to accept as defendants,

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residents of another state, against whom no redress in action for mesne profits can be had in this state unless they please to appear. The plaintiffs, if they recover in ejectment, ought not, by the act of the court, in admitting defendants, to be driven to seek their mesne profits in a distant state. The plaintiffs claim that the avowed object of the application is one which is entitled to no favorable consideration. It is the peculiar and the exclusive province of the state courts to settle the rights of property within the state. The federal courts expressly and fully recognize this, and conform their decisions to those of the states. This, then, is an attempt to draw the decision from the appropriate tribunal to one that confessedly follows it in its decisions. Ought this court to aid parties in the perfecting such an object?

The English statute, upon this subject (11 Geo. II., c. 19, s. 13), made it lawful for the court to admit the landlord to join, as defendant, with the tenant, or to be made defendant by himself. There is more verbiage in the English statute than in ours. But their provisions are substantially the same. Very soon after the enacting of this statute, *Fairclain, Lessee of Fowler, v. Shawtelle*, 3 Burr. 1290, 1304, it was admitted in the king's bench that this statute was but an affirmance of the practice of the courts. Since the statute the English courts, in admitting defendants, have been careful to establish the practice that was calculated *to [442 protect the interests of all concerned. And we hold that our court should act upon similar principles.

The lessees in this case, who are the actual tenants, have a direct and permanent interest. They only are entitled to the present possession. The persons claiming to be exclusive defendants, could not dispossess them. But by colluding with a plaintiff, if permitted to make the entire defense, this could be effected. Nothing short of an express refusal of the lessees to be made defendants, would warrant the court in substituting the applicants, even if the plaintiffs did not object. We deem it unnecessary to enlarge upon this matter.

By the COURT:

Upon service of a declaration in ejectment, if no application be made to the court by the tenant, or other person claiming title, for leave to defend, a judgment by default passes as of course; and the court have no power to compel the tenant in possession, or

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any one else, to make a defense. By section 59, of the judiciary act, a discretionary power is vested in the court to admit the tenant, landlord, or other person claiming title, upon application being made to the court for that purpose. In these cases the tenants are not before us. They make no application to be admitted defendants, either severally or in conjunction with their landlords; and it is out of the power of the court to compel them, *volens volens*, to undertake the defense. The application is made by the landlords alone, and having exhibited a *prima facie* right, they must be admitted as defendants. The landlords being admitted as defendants, and showing themselves citizens and residents of the Commonwealth of Pennsylvania, are entitled to the privileges of the act of Congress; and the cases are accordingly certified to the Circuit Court of the United States:

443] *CINCINNATI WATER COMPANY v. THE CITY OF CINCINNATI.

Where a plaintiff recites a special title in his declaration conducing to his cause of action, as an ordinance of a city corporation, he must set it out in terms.

THIS was an action on the case, reserved from the county of Hamilton.

The declaration alleged that on March 31, 1817, the town council of the city of Cincinnati, by their certain ordinance, granted to the Cincinnati Manufacturing Company, their heirs, successors, and assigns, the exclusive privilege of conveying water, by tubes or otherwise, from the Ohio river, through the streets, alleys, etc., of the city of Cincinnati, for the purpose of supplying the inhabitants, etc., for the term of ninety-nine years, *upon certain terms, in said ordinance expressed*. That on March 18, 1820, the Cincinnati Manufacturing Company duly assigned all their interests and privileges, acquired under said ordinance, to one Samuel W. Davies, who, with his associates, on January 7, 1826, were duly incorporated under the name of the Cincinnati Water Company. That the Cincinnati Water Company thus acquired the exclusive privileges so granted by the city, and became possessed of all the buildings, machinery, pipes, reservoirs, etc., of the Cincinnati

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water-works, and became and were the owners, and were possessed of divers pipes, etc., located in divers streets, alleys, etc., which were particularly specified and described in the declaration. That the Cincinnati Water Company being so possessed, etc., and enjoying great profits, etc., the city of Cincinnati, not ignorant of the premises, but contriving and intending to injure and oppress the Cincinnati Water Company, and to deprive them of the profits, etc., and to put them to a great expense in removing and replacing said pipes, etc., by a certain ordinance of the city council, did order and direct, and cause the said streets and alleys to be dug down, torn up, and the water pipes, etc., therein located, to be dug up and destroyed, etc., and compelled the Cincinnati Water Company to replace their pipes, etc.

The defendants demurred generally. The court of common pleas sustained the demurrer, and the plaintiffs appealed to this court.

*STORER and FOX, in support of the demurrer: [444

We insist that the ordinance under which the plaintiffs derive their rights, and which is treated by them as a contract between the city and the manufacturing company, is not sufficiently set out.

If the plaintiffs have any foundation for the privilege they claim, and which they insist has been greatly injured, it is material to understand, specifically, the nature, extent, and character of their right. It is admitted that the right was granted on certain conditions; and it is therefore contended by the defendants that these conditions must be set forth specially, that it may appear how far the plaintiffs have complied, or neglected to comply, with their part of the contract. If there should be any conditions precedent, to be performed by the party seeking a remedy, it must be yielded at once that the account of performance should be full and positive.

Whether, then, we regard the instrument, by which the privilege was granted, as a contract on the part of the town, duly entered into by its authorized agents, or merely an ordinance or by-law conferring a right, we insist the whole instrument must be set out in the pleadings of the plaintiffs.

The by-laws or ordinances of a corporate body, having legislative power, like all private acts of the legislature, can not be taken notice of by courts unless they are specially pleaded. 1 Chitty's Pl. 211; 6 Bac. Ab. 395; Howard's case, 4 Co. 76. And

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there is a peculiar reason why the whole by-law should be set out, as the court are bound to know whether it is lawful, reasonable, and just, in the language of Lord Coke. 8 Rep. 126, "*legi, fidei, rationi causona.*"

As it is the exercise of power, by an inferior jurisdiction, the court should know judicially whether that power has not been exceeded. 2 Burr. 177. And if it should appear on the record to be such an act that the corporation had no power to do, the court would be bound to disregard it.

The Mayor, etc., of New York, *v.* Ordrender, 12 Johns. 122; 6 Pick. 187. Vandine petitioned for a writ of *certiorari* against the city of Boston. In this case Chief Justice Parker expressly decides the point we have assumed, as to the necessity of pleading specially the whole by-law.

445] *It seems, therefore, clear to us, that the instrument should be fully set out.

If the plaintiffs regard the grant of their privilege as a contract between the manufacturing company and the city, the rule we have relied on will, *a fortiori*, hold good.

It can not be disputed, that in declaring on a contract, the whole consideration must be stated, and no part of it can be omitted; and if any proviso or condition in the contract constitute a condition precedent, or there be any matter which qualifies the contract, or goes in discharge of the liability of the defendant, it must be stated. 1 Chit. Pl. 301, 302.

The plaintiffs can not urge that it is for the defendants to plead such matter in their defense. If they were bound to perform any precedent duty their cause of action was entirely dependent upon such performance. Nor can it be said, with any legal propriety, that there are no such precedent conditions, because they do not appear to the court. The whole contract is not set out; it can not, therefore, be inferred what it is; and until its conditions are ascertained it seems clear no correct adjudication can be had.

HAMMOND, contra :

The defendants demur generally; and, in argument, allege two grounds of demurrer :

First. Because the ordinance conferring the right is not set out at large.

Second. Because the action is not sustainable at all.

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Upon the first point I am not able to perceive the force of the argument, nor the application of the authorities upon which the defendants rely. The recital of the ordinance, as the foundation of the right, imposes upon the plaintiffs the obligation of producing and proving it at the trial. It is but matter of inducement to the action, and not that upon which the action is grounded. When produced at the trial, its terms and conditions are open for inspection. And, upon the whole case, the court can then adjudicate upon what rights it is created, whether the plaintiffs are in possession of those rights, and whether the injuries complained of violate them. When deeds, grants, or contracts are alleged only *by way of inducement, as tracing a right in the plaintiff, [446] it is not necessary to recite them at large, although it is necessary to allege and prove them. This seems to me the plain good sense of the case, and altogether consistent with the authorities cited for the defendants. I am not, however, solicitous about it, for I trust that if the court consider the exception well taken, they will permit us to amend.

By the COURT:

The plaintiff might, perhaps, have rested his title upon his possession, but he has chosen to set out his title, and he must therefore set out a good title. 1 Chit. Pl. 215. He claims title under an ordinance of the city of Cincinnati, and from his own showing it appears that his rights depend "upon certain terms in said ordinance expressed." It does not appear what those terms are, or whether they are such as give him any rights. (a)

Demurrer sustained.

(a) A plaintiff, who is to recover upon the strength of his own case, is to show that sufficiently to entitle himself. 13 East, 112; 1 Bos. & Pul. 97.

Reeder and others v. Barr and others.

STEPHEN W. REEDER AND OTHERS v. JOHN T. BARR AND OTHERS.

A patent issued to N., *assignee of the administrator of H. R., deceased*: Held, that a subsequent purchaser can not set up the plea of innocent purchase, without notice, against the heirs of H. R.

THIS was a suit in chancery, reserved for decision by the Supreme Court in Hamilton county.

The bill sets forth that the complainants are the heirs at law of one Henson Reeder, who died in the year 1811. That some time in the year 1810, Henson Reeder purchased a certain lot of land, in the city of Cincinnati, of the United States, and paid up a part of the whole of the purchase money, and obtained a certificate therefor, in the usual form, and took possession thereof. Some time after the death of Henson Reeder, Samuel Newell set 447] up some claim to said *lot, as assignee of the administrator of Henson Reeder; and by falsely representing himself as such assignee, obtained a patent for the lot in his own name; that the administrator of Henson Reeder never sold, directly or indirectly, said certificate, or any interest whatever in the lot, to Newell, or any other person, and had no power so to do. That Newell took forcible possession of the land, and retained the same until 1823, when it was sold upon execution, as the property of Newell, to the defendants, John T. Barr and Thomas Welch.

The bill also charges that the defendants, Barr and Welch, when they purchased, had notice that Newell claimed title only as assignee of the administrator of Henson Reeder; that his title is so recited in the patent, and knew also that said administrator did never, in fact, assign any interest in the lot to Newell.

It is also charged that the patent was fraudulently obtained, and the President of the United States imposed upon.

The patent was issued on August 15, 1816, to Newell, *as assignee of the administrator of Henson Reeder, deceased*. The bill prayed for an account of the rents and profits, and for a reconveyance of the title.

The defendant, Barr, filed his plea in bar, alleging that on December 8, 1819, Newell being in the quiet possession of the lot, mortgaged it to Barr and Welch for a valuable consideration; that the mortgage became forfeited; a *scire facias* issued; a judg-

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ment was rendered, and the lot was taken in execution, and sold by the sheriff to Barr and Welch, and conveyed to them by the sheriff, on February 26, 1823; that Barr and Welch took possession; and on October 5, 1826, Welch, for a valuable consideration, conveyed all his interest in the lot to Barr, who has continued the possession ever since; that he had no notice whatever of the claim of the plaintiffs, or that Newell claimed title only as assignee of the administrator of Henson Reeder; or that his title was so recited in his patent; or that the administrator had not assigned the title of said lot to Newell, at or before the time when he, the said Barr, acquired his title, as herein set forth; and that he was an innocent purchaser, for valuable consideration, and without notice.

To this plea the plaintiffs filed a general replication.

*The defendant, Newell, answered, denying all fraud, and [448 disclaiming title, the lot having been sold upon execution, as set forth in the plea in bar.

No testimony was taken.

STOREE and Fox, for complainants:

The complainants contend, that inasmuch as the patent is granted to "*Samuel Newell, assignee of the administrator of Henson Reeder,*" and inasmuch as Barr claims under that deed, he is chargeable with notice, first, that Newell claimed title from a trustee merely; second, that the trustee could not dispose of any interest, in real estate, without an order of court for that purpose.

1. It is well settled, that "where a purchaser can not make out his title but through a deed which leads to a fact, he will be affected with notice of that fact." 2 Mad. Ch. 327; Beame's Plead. 252; 2 Schoale & Lefroy, 327; 13 Vesey, 117, 118; Newland on Contracts, 511. Inasmuch, therefore, as Barr can not make out his title without the patent, he is chargeable with notice that Newell purchased, or pretended to purchase, of an administrator.

2. Knowing that Newell purchased of an administrator, he was bound to know that no administrator, merely as such, had authority to dispose of real estate, except under an order of court; and, in taking the estate, he took it subject to all the equities to which it was subject in the hands of Newell.

If A. make a conveyance to B., with power of revocation by

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will, a subsequent purchaser is intended to have notice of the will, as well as of the power of revocation. Newland on Contracts, 511.

So, where a purchaser claims under a conveyance, where there was an estate tail prior to the estate under which he purchases, it is incumbent on him to see if that estate is spent. *Id.*

In 3 Johns. Ch. 344, the court decided that a purchaser purchasing under the commissioners of loans, who had special authority to sell in a particular mode, was bound to know whether the 449] sale was made in a regular or irregular manner, and that he was affected by all irregularities in the sale.

In *Lessee of Willis v. Bucher*, 2 Binney, 455, the defendant claimed title under one William Willis, to whom a patent had issued, reciting that the title was derived under the will of Henry Willis. On referring to this will, it was found that the will did not authorize a sale.

Several sales had been subsequently made to persons who were innocent purchasers, unless the recital in the patent charged them with notice.

The question, therefore, presented in the case before the court and in 2 Binney are exactly alike. Judge Tilghman, in deciding this point (page 466), says: "The learned judge, who tried the cause, was of opinion that the purchasers were not bound to look further back than the patent; and, no doubt, this opinion must have had great weight with the jury. This is a principle of very great importance, considering the vast mass of property which is held without patent in this commonwealth. It may have very extensive and alarming consequences, if every purchaser from a patentee is to be considered as having *no notice*, and not bound to take notice of anything prior to the patent. In cases like the present, *where the prior title is referred to in the patent, there is no reason why the purchaser should not take notice of it.* The will of Henry Willis was recorded, and it was the fault of the purchasers not to examine it."

It appears to us that two cases more analogous can not be found than the one now before the court and the case last cited. Both patents refer to the origin of the title claimed by the assignee. The sale was void in the one case, because the will did not authorize a sale. The sale is void in the other case, because the law did not authorize a sale to be made by an administrator without an

order of court. The plea admits there was no order of court granted. The law says, he is chargeable with notice of the fact that it was an administrator's sale. The purchaser, then, is placed in this situation: he buys of a person who he knows is not authorized to sell, and, of course, can not keep the property from the true owner.

*N. WRIGHT, contra:

[450]

If a purchaser can not make out a title but by a deed which leads to a *fact*, he shall be deemed cognizant of that fact. 2 Fonbl. Eq. 151.

The fact shown by Newell's patent is, that the administrator had assigned; nothing more. Sugden states the rule in the same way; and, for example, adds: "Therefore, if a man knows the legal estate is in a third person, he must take notice what the trust is." Sug. Fraud, 498.

"But the recital of a fact in a deed, which may or may not, according to circumstances, amount to a fraud, will not amount to notice." Sug. 500.

And the recital must be such a reference to the fact that "it will be deemed *crassa negligentia* that he sought not after it." Sug. 499.

2 Mad. Ch. 327, states the law in the same way.

Newland Con. 511, states it thus: "When the law imputes to the purchaser the knowledge of a fact, of which the exercise of common prudence and ordinary diligence must have apprised him." "Thus, if by looking into a deed, etc., in his claim of title, he must have been apprised of a *right in another person*, etc., notice is presumed."

Lord Erskine states it thus: "Another case is, where the law imputes that notice, which, from the nature of the transaction, every person of *ordinary prudence* must necessarily have." *Thirn v. Mill*, 13 Ves. 120.

In support of the foregoing doctrines, as laid down in the elementary books, Newland cites: *Ferrars v. Cherry*, 2 Term, 384; *Morret v. Paske*, 2 Atk. 54; *Coffin v. Fannyhough*, 2 Bro. C. C. 291; *Tanner v. Florence*, 1 Ch. Cas. 259; *Vane v. Barnard*, Gilb. 8; *Biscoe v. Banbary*, 1 Ch. Cas. 28; *Lowe v. Smith*, 1 Atk. 490; 2 Ves. Jr. 440; *Moore v. Bennet*, 2 Ch. Cas. 246; 1 Ch. Cas. 291; 1 Atk. 522.

Fonblanque cites most of the same cases, and also *Bovy v. Smith*,

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1 Term, 649; *Druoch v. Kent*, 1 Term, 319; *Drapers Co. v. Yardley*, 2 Term, 662; *Martins v. Joliff*, Amb. 313.

Sugden cites the same cases, and also 2 *Frazier*, 337; *Kenny v. Brown*, 3 Ridgw. P. C. 512; 1 *Durnf. & E.* 763.

Maddock cites most of the same cases, and also 2 *Anst.* 431, 428; *Eyre v. Dolphin*, 2 Ball & B. 301.

451] *In all these cases, so far as I have been able to examine them, the recital in the deed or will, which was held to be sufficient notice, was an express and direct recital of the equitable right sought to be established, or a reference to some other deed which expressly stated the right. The right was expressly shown. In the case now before the court the patent shows no right in another.

In *Beame*, the law is thus laid down: "Constructive notice is no more than evidence of notice, the presumptions of which are so *violent* that the court will not allow even of its being controverted." *Beame's Pl. Eq.* 252.

I consider it clear, from the foregoing cases, as well as from reason, that the rules of law, on which complainant relies, go no further than this: that the chain of title must show, by *express recital*, the equitable title set up or the fraud charged, or must refer to some other instrument or fact, showing such title or fraud, in such a way that the purchaser could not, without *gross negligence*, avoid noticing it.

In the present case, the patent does not recite any title in another nor any fraud; and the only question must be, whether it refers to any other fact in such a way that the purchaser is chargeable with gross negligence for not noticing that fact. By gross negligence I am willing to be understood to mean, the want of that prudence which a man of *common prudence and ordinary diligence* would use.

The recital is, that *Newell was the assignee of the administrator of H. Reeder*. The law authorized the administrator to make sale of the land on complying with certain forms, etc. The purchaser had a right to presume that the administrator, who acted under an oath of office, had done his duty, and obtained the proper order of court; there was nothing in this recital, therefore, calculated to alarm him; nothing which would naturally suggest to him the idea that there was any defect in the assignment, or any fraud; nothing which would put a man of ordinary prudence upon inquiry for such objections.

Again: the officers of the United States act officially in issuing the patent, and are required, by law, to see that the assignment was duly made before a patent could issue to the assignee. The purchaser had a right to presume that they *also had done [452 their duty, and that they had issued the patent upon legal assignments. So far, therefore, from being led, by the recital, to suspect any defect or fraud in the assignment, the presumption of law, as well as the common understanding of men, would be that the assignment was right and fair.

The presumptions of law always are, that a man has conformed to his duty, not that he has been guilty of fraud. 3 Stark. Ev. 1249. "*Omnia presumuntur rite et solemniter acta, donec probitur in contrarium.*" Stark. Ev. 1248, 1250. "*Odiosa et inhonesta non sunt in lege presumenda.*" Stark. Ev. 378; 10 East, 216. "The presumption is that he has conformed to the law."

"A person shall be presumed duly to execute his office till the contrary appear." Williams v. E. J. Co., 3 East, 200.

"If a person is required to do an act, the omission of which would make him guilty of a culpable neglect of duty, it ought to be intended that he has duly performed it." Hartwell v. Root, 19 Johns. 347.

So in relation to the effect of a patent, the presumptions are equally favorable.

Chief Justice Marshall says, "The laws for the sale of public lands provide many guards to secure the regularity of grants and protect the incipient rights of individuals, etc.; that every prerequisite has been performed, is an inference properly deducible, and *which every man has a right to draw* from the existence of the grant itself." Polk's Lessee v. Wendell, 9 Cran. 98.

Justice Johnson says, "The existence of the grant itself is, in itself, a sufficient ground, from which every man may infer that every prerequisite has been performed." S. O., 5 Wheat. 304; Patterson v. Jenks, 2 Pet. 237.

The presumption is, that an agent, intrusted to execute a particular authority, has done everything requisite for the completion of it. Boville v. Bradbury, 2 Stark. 136; Pat. Ag. 4.

Such being the legal presumptions, surely the purchaser could not be chargeable with gross negligence, because he did not presume differently; because he did not perceive, in the recital, any intimation which would lead him to inquire *into the suf- [453

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iciency of the assignment. Prior to the time Judge McLean was in the land office it is probable that most of the assignments of land certificates by administrators were informal; but, I believe, it has never been thought of, that a subsequent purchaser after the patent was bound to inquire into their regularity, and they must all have recited the same fact as appears in this patent.

An innocent purchaser, without notice, is a favorite in equity. No step shall be taken against him; he shall be protected, unless the proof is full and satisfactory. If the evidence is loose, and only creates a suspicion, courts will not act upon it; and the recital of a fact, which may or may not amount to a fraud, according to circumstances, is not notice. 2 Ves. Jr. 458; *Eyre v. Dolphin*, 2 Ball & B. 301; 8 Johns. 108; 2 Mad. Ch. 327; *Sug. Vend.* 500.

The recital in the patent shows certainly no more than this last rule requires. For, if there were even no legal presumptions in favor of the regularity of the assignment, the most that could be said, would be, that it might, or might not, be regular, according to circumstances.

In *Frost v. Beckman*, a mortgage for three thousand dollars was recorded as for three hundred only, and held it was good against a purchaser only for three hundred dollars. There the purchaser had notice of the mortgage, and it might as well have been said that he was bound to see the original mortgage itself; but held that he had a right to believe the recorder had done his duty. 1 Johns. Ch. 288.

The result of my argument is, that the recital in the patent in question is not the recital of any *right* or *interest* existing in Reeder's heirs. It recites merely the fact that the administrator had made the assignment; and, of course, the only question is, whether, with knowledge of that fact, the purchaser is chargeable with such gross negligence for not looking into the administrator's proceedings, that his title can now be defeated by the administrator's default; and I insist that the purchaser is not so put upon his guard by the recital as to be chargeable with the defaults of the administrator: *First*. Because he has a right to suppose that the administrator, acting under a judicial appointment, and the infliction of 454] an oath, has done his duty; and, *second*. Because *he has also a right to believe that the officers of the United States have done their duty.

In this view of the case, I do not perceive the application of the case of *Willis' Lessee v. Bucher*, 2 Bin. 455, cited by the other side. In the first place, it is evident in that case that the patent by its recitals showed distinctly that all the right of William Willis, the patentee, was his right as devisee, under the will of his father. That will show that he had an estate tail, and not a fee. Had the present case recited the purchaser to be *devisee* of Reeder, the case might, perhaps, be different; for then the legal presumption that the administrator had done his duty would not arise. The devisee of an estate tail would be entitled, of course, to the patent; and, whether the interests of the tenant in tail could be otherwise protected in the patent, under a will of doubtful construction, than by reference to the will as the foundation of the title, is, at least, questionable. We are not informed of the extent of the recitals in that case. If they were such as evidently to guard the rights of all parties, the decision of the court merely carried into effect the purport of the patent.

Again: It appears from the arguments of counsel in that case, that the land in question was *proprietary* lands; it was sold as early as 1737, or 1744; it was the property of individuals, not of government, and, though the deed perfecting the title is called a patent, it does not appear that such patent was issued under any sanctions of public law; that it passed the hands of any officer in whose correctness and fidelity the public had a right to rely. So far as appears, it was the mere private deed of the proprietors, and so the defendants' counsel speak of it.

Again: The judge himself, in giving his opinion, relies upon the peculiar situation of titles in that state; and the counsel speak of the warrant, with payment of purchase money, as giving a legal title, according to their construction, and of the question of notice, overreaching the patent, as a question settled in practice in that state with reference to the peculiar situation of that description of titles. It is evident, therefore, that the decision turns upon local circumstances in part, if not altogether.

*Either of the foregoing considerations is sufficient to dis- [455] tinguish the case in Binney from the present. Others might be urged, but it is hardly necessary, for a case so equivocal can not weigh much against clear law.

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Fox, in reply :

The opposite counsel seems to think that it is necessary, wherever the plea of innocent purchase is put in, for the plaintiff to show such circumstances of notice as to charge the defendant with gross neglect. But such is not the law; if it were, purchasers *pendente lite* could never be affected; for I know of no case where a purchaser, *pendente lite*, has been affected on the ground of his being negligent. On the contrary, the great principle upon which all *pendente lite* purchasers are chargeable with notice is public policy. There would be no end of suits, if a defendant could transfer his legal title to an innocent purchaser as soon as a bill was filed against him to obtain that legal title. 3 Ohio, 542.

The same may be said where a man is chargeable with notice given to his agent and the agent neglects to inform his principal. The principal is bound, but not because he was guilty of gross neglect, but because a man might be in a better situation, by employing another person to purchase, than if he attended to the purchase himself.

It is laid down in Sugden, that the recital in a deed of a fact, which may, or may not, according to circumstances, be held in a court of equity to amount to fraud, will not amount to notice. Sugden refers to 3 Ridgw. 512, a book not to be found in Cincinnati, and it is certainly difficult to tell what the writer means by, this short note. Notice of a fact which may, or may not amount to fraud, will not charge the party with notice. I can not tell what it means. "If A. makes a conveyance to B., with power of revocation by will, a subsequent purchaser is intended to have notice of the will, as well as of the power to revoke." Newland on Contracts, 511, 512, and other cases cited.

Cases in 9 Cranch, 5 Wheaton, and 2 Peters are cited to show 456] *that when a patent has issued, every man may infer that every prerequisite has been performed.

This position is true, in one sense, and in one only. So far as the government is concerned, I admit it is to be presumed that they have received payment for the land, that a proper survey has been filed, etc. But it is evidence of nothing as to third persons. And the reason of this obvious. The person issuing the patent is a mere ministerial officer.

That I am correct in this position, will appear manifest, by referring to the numerous cases of equity, where a person having an

elder entry, comes into court to obtain relief, against an elder patent on a younger entry.

If the presumption is, that the officer issuing the patent acted correctly; and if you can not go behind the patent, on what authority is it, that the court acts in taking away the legal title from the elder patentee, and giving it to the younger. May the courts go further, and say that the plea of innocent purchase is not a good plea in such cases?

The case in 9 Cranch, 98, merely decides that, as to all matters, merely directory to the officers, the court will presume the directions of the statute have been complied with, after patent in an action at law.

But the court say, "there are some things so essential to the validity of the contract, that the great principle of justice and of law would be violated, did there not exist some tribunal to which an injured party might appeal." And they conclude the proper tribunal is a court of equity.

And by examining the case in Cranch a little further, the court will see it is directly in favor of the position we take. For they say, "If, as the plaintiff offered to prove, the entries were never made, and the warrants were forgeries, then no right accrued under the act of 1777; no purchase of the land was made from the state, and independent of the act of cession to the United States, the grant is void by the express words of the law."

What, then, becomes of the presumptions in favor of a patent arising from the mere issuing of the patent. In a case at law, the Supreme Court decided a patent to be void, merely because the officer had issued it upon forged warrants and entries.

*The case referred to by Mr. Wright, in 5 Wheaton, is the [457 same as that in 9 Cranch, and the words quoted by Mr. Wright are a part of a quotation from the judge's opinion in 9 Cranch.

We think that the very object of requiring the names of the assignors and assignees to be mentioned in all the patents is for the purpose of preventing frauds being committed; and if it appears a patent has been obtained on a forged assignment, or on an assignment made by a person having no authority to make it, the patent has been issued *without authority*, for a patent can only be issued to the original purchaser, his heirs, or assigns. Suppose a patent issues to A. B. & Co., as heirs of D., when, in fact, E. was the true heir, can it be possible that E. is to be cheated out of his

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rights by such a contrivance? Unquestionably the court would say the patentee is bound, in a suit brought by the real heir, to give up his title.

The great error in Mr. Wright's argument is this: he appears to treat the case as though an administrator, merely as such, has power to convey interests in real estate, whereas the reverse is the truth of the case; and this distinction must be kept strictly in view. Whenever the title to property vests in an administrator, and he disposes of it, he will be presumed to have disposed of it properly, because he *had authority* to dispose of it. But real estate does not vest in an administrator. He has no power to sell as an administrator; and if a person claims title under an administrator, he must show that the administrator has obtained *authority to sell*. The court may presume that a power has been correctly executed in some cases, but they never will presume that a power was *created*. This principle runs through all the cases, and has been acted upon frequently. Take the position of Mr. Wright to be correct—that the administrators will be presumed to have acted under a power—and the court must overrule everything which has been decided with regard to such sales.

If an administrator makes a deed for land, according to this doctrine, no order of court need be shown, for it is to be presumed he had one. But this court, in *Lessee of Goforth v. Longworth*, last court in bank, think differently. 4 Ohio, 120.

458] *Again: In sales by sheriff, if a deed is made, the court are to presume a judgment and execution. Yet this court have decided that a judgment and execution, and an order confirming the sale, must be shown.

To conclude, then, we take this to be the law: that where a person purchases under one not owning the property himself, but relying on the sufficiency of a power to sell, the vendee, and those claiming under him, must be charged with a full knowledge of the extent of that power, and if there is no power, the sale is void.

We have not argued the question as to the power of the court to grant an order for the sale of a mere equity to administrators. Our opinion has been that in 1816 the court had no such power. If the court are of this opinion it makes our case stronger.

By the Court:

The patent was issued to Newell, as assignee of the administrator

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of *Henson Reeder, deceased*; and the only question is, whether this disclosure of the rights of the patentee, and of the manner in which they were acquired, is sufficient to charge a subsequent purchaser, with notice of the equitable rights of the complainants, as heirs at law of Henson Reeder. The true rule upon this subject appears to be "that the law imputes that notice, which, from the nature of the transaction, every person of ordinary prudence must necessarily have." 13 Ves. 120; Mad. Ch. 327; Newland, 511.

If, in the investigation of a title, a purchaser, with common prudence, must have been apprised of another right, notice of that right is presumed. Here, Barr, in tracing his title, must have seen from the patent that Newell's right was derived from an administrator who possessed no title to the land himself, and whose deed could be available only by a previous compliance with certain legal formalities. If the assignment of an administrator, *per se*, conveyed the equitable rights of the intestate, the purchaser might stand in a different situation. As it is, we are of opinion that the recital in the patent is sufficient to put a man of ordinary prudence to an inquiry for the rights of the heirs, and that a subsequent *purchaser must, at his peril, ascertain [459 whether those rights have been regularly extinguished.

Authorities are cited to show, that presumptions of regularity are to be made in favor of public officers. 3 East, 200; 19 Johns. 347. And that the existence of a grant is sufficient ground to presume that every prerequisite has been performed. 9 Cranch, 98; 5 Wheat. 304. If this grant wore a simple conveyance to Newell, his assignees might, perhaps, claim the benefit of these rules; but the grant, upon its face, shows that the heirs of Reeder were the owners of the estate, after the death of their ancestor; and it is going too far to say, that there is a legal presumption, not only that the officers of government have performed their duties, but that the rights of the heirs of Reeder have been divested by a judgment of a court of competent jurisdiction.(a)

Plea overruled.

(a) Purchasers under letters patent, reciting a trust, are bound to take notice of the trust at their peril. 1 Ves. 261, 319; 1 Ch. Cas. 258. So a purchaser under persons authorized by statute to sell, is presumed to know the nature and extent of the authority, and purchases at his peril. 3 Johns. Ch. 344.

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WILLIAM H. LYTLE AND HENRY AVERY v. THE CINCINNATI
MANUFACTURING COMPANY.

Money made upon a junior judgment in life can not be distributed to elder judgments and levies, where five years have elapsed from issuing an execution, and the judgment is not revived.

CERTIORARI to the court of common pleas of Hamilton county, to reverse an order for the distribution of certain moneys made upon execution.

At November term, 1829, the sheriff returned that he had made twenty-six thousand eight hundred and sixty dollars upon an execution issued on a judgment in favor of Lytle and Avery against the Cincinnati Manufacturing Company. Upon this return, several other judgment creditors appeared, and claimed this money or a part thereof, and founded their claims upon the following state of facts:

460] *October 12, 1820, the Miami Exporting Company recovered a judgment against the Cincinnati Manufacturing Company for seventeen thousand eight hundred dollars. *On the same day*, Samuel Davis, James Findlay, and Jacob Wheeler recovered a judgment against the same defendants, for ten thousand two hundred and thirty-six dollars and fifty cents. *On December 27, 1820*, Lytle and Avery recovered a judgment against the same defendants, for forty-nine thousand six hundred and forty-five dollars and fifty-nine cents. There was also another small judgment against the same defendants, in favor of Henry Hafer, which, by the agreement of all parties, was entitled to a preference, and about which there was no dispute. Upon the other three judgments, executions were issued, and returned as follows:

MIAMI EXPORTING COMPANY.—*Judgment October 12, 1820.*

<i>Execution.</i>	<i>Date.</i>	<i>Return, etc.</i>
Fi. fa. et lev. fa.	Jan'y 30, 1821.	Levy on land, January 30, 1821.
Vendi.	Dec. 8, 1821.	Unsold.

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<i>Execution.</i>	<i>Date.</i>	<i>Return, etc.</i>
Al. vendi.	June 19, 1823.	Sold on an execution, in favor of Davis, Findlay, and Wheeler. This return, on motion of plaintiffs, was set aside at August term, 1823, to which the writ was returnable. This judgment was revived by <i>scire facias</i> , on December 24, 1829.

DAVIS AND OTHERS.—*Judgment, October 12, 1820.*

<i>Execution.</i>	<i>Date.</i>	<i>Return, etc.</i>
Fi. fa. et lev. fa.	Jan. 31, 1821.	Jan. 31, 1821. Levied on same land, as execution in favor of Mi. Ex. Co.
Vendi.	April 2, 1822.	To May 7, 1822. Stayed by injunction.
Al. vendi.	June 25, 1823.	Aug. 1, 1823. Sold to J. C. Morris. At August term, 1823, this sale was set aside by the court.
*Pl. vendi.	Nov. 11, 1823.	Dec. 15, 1823. Sold [461 to the plaintiffs in execution. This sale, and the valuation, was set aside, by consent, Sept. 3, 1829.

LYTLE AND AVERY.—*Judgment, December 27, 1820.*

<i>Execution.</i>	<i>Date.</i>	<i>Return, etc.</i>
Fi. fa. et lev. fa.	Feb. 8, 1821.	February 9, 1821. Levied on same land, as execution in favor of Mi. Ex. Co.
Vendi.	March 27, 1824.	Not given to the sheriff.
Al. vendi.	March 23, 1827.	Indorsed, "Judgment assigned to U. S. Bank, March 31, 1827." Stayed by Jones and Fox, June 27, 1827.

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<i>Execution.</i>	<i>Date.</i>	<i>Return, etc.</i>
Pl. vendi.	June 16, 1829.	Sold, July 20, 1829, to the Mi. Ex. Co. This sale and the valuation were set aside by consent, Sept. 3, 1829.
Al. pl. vendi.	Sept. 10, 1829.	Sold, November 16, 1829, to G. W. Jones, agent U. S. Bank, for twenty-six thousand eight hundred and sixty dollars, the money now in controversy.

The assignees of the judgment of Lytle and Avery against the Cincinnati Manufacturing Company also offered in evidence a mortgage of the premises levied upon, dated December 11, 1820, executed by William Lytle, William H. Lytle, and Timothy Kirby, in their capacity as trustees of the Cincinnati Manufacturing Company, to William H. Lytle and Henry Avery, to secure the payment of forty-eight thousand eight hundred and six dollars and eighty-two cents. This mortgage was recorded January 9, 1821, and on April 13, 1826, was assigned by Avery and Lytle to the Bank of the United States.

462] *Also, a notice, dated December 21, 1820, signed by David E. Wade, president *pro tem.*, and William Oliver, cashier, served upon the Cincinnati Manufacturing Company, notifying them that the Miami Exporting Company, on the 25th of December then next, would take judgment against the Cincinnati Manufacturing Company upon the same debts for which the judgment had been rendered in favor of the Miami Exporting Company against the Cincinnati Manufacturing Company; and that at the date of this notice, Wade and Oliver acted as the officers of the Miami Exporting Company.

Also, a declaration in assumpsit, signed by Este and Storer, as attorneys for the Miami Exporting Company, against the Cincinnati Manufacturing Company, founded upon the same debt, and served upon the latter company at the same time with the above note.

Also, a bill in chancery, filed in the Supreme Court of Hamilton county, at June term, 1821, by the Miami Exporting Company, against Davis, Findlay, Wheeler, and others, in which the Miami

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Exporting Company charged that Davis and Wheeler, pretending to be two of the trustees of the Cincinnati Manufacturing Company, on September 2, 1820, made a warrant of attorney to Joseph S. Benham, Esq., by virtue of which he confessed the judgment in favor of the Miami Exporting Company against the Cincinnati Manufacturing Company; that the Miami Exporting Company were never consulted by Davis and Wheeler as to the confession of said judgment, or the warrant of attorney to Benham; nor had they any knowledge thereof until after the judgment was confessed; and they deny any and all right in Davis and Wheeler to make said power of attorney in behalf of the Cincinnati Manufacturing Company; and pray that the said judgment be decreed null and void, and completely vacated for the want of authority in Davis and Wheeler to make said warrant of attorney, and for the manifest collusion, fraud, and illegal conduct, on the part of the defendants in the bill, in obtaining the judgment. This bill was dismissed by the complainants the same term at which it was filed, and the injunction allowed therein dissolved.

*Also, the following statement of David E. Wade, which was [463 admitted in evidence, by consent, as if sworn to, not admitting its truth or competency. David E. Wade states that, in 1820, he was a director of the Miami Exporting Company, and acting as their president *pro tem*; that the above bill in chancery was filed at the instance of B. Storer, one of the counsel of the bank, Mr. Este being absent; that he was first induced to take some steps in this matter by Henry Avery, who informed him how the judgments were taken, and urged him to file the bill, which he did, by the advice of Storer and two or three of the directors, contrary to his own opinion. He thinks the board of directors were not convened upon the occasion.

The Miami Exporting Company gave in evidence a bill in chancery, and an injunction allowed thereon, filed in the Supreme Court of Hamilton county, on May 18, 1821, by the Cincinnati Manufacturing Company, against the Miami Exporting Company, Oliver M. Spencer, and William Oliver, charging that the warrant of attorney to Benham was unauthorized by the Cincinnati Manufacturing Company, and reciting the allegations contained in the bill filed by the Miami Exporting Company, against the Cincinnati Manufacturing Company, as above set forth; and charging that the Miami Exporting Company had levied an exe

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cution on the lands of the Cincinnati Manufacturing Company, and were proceeding to sell the same, and prayed a perpetual injunction. The bill was answered; and, on the final hearing, May 19, 1823, was dismissed, at the costs of the complainants.

Also, the record of the original judgment in favor of the Miami Exporting Company against the Cincinnati Manufacturing Company, and of the proceedings in a writ of error allowed thereon, from which it appeared that a summons issued in favor of the Miami Exporting Company against the Cincinnati Manufacturing Company, on the 7th, and was served on October 13, 1820, and that the judgment was confessed by Benham on the 12th of the same month, by virtue of a warrant of attorney for that purpose, executed by Davis and Wheeler, as trustees of the Cincinnati Manufacturing Company, with a release of error, and stay of execution for three months. Upon this judgment a writ of error was allowed on September 27, 1825, and continued in the Supreme Court until May term, 1829, when the same was quashed, on the motion of the defendants in error.

Also, the record of the original judgment in favor of Davis, Findlay, and Wheeler, against the Cincinnati Manufacturing Company, and of the proceedings in a writ of error allowed thereon; from which it appeared that this judgment was confessed by Benham on the same day, and under the same circumstances, as the judgment in favor of the Miami Exporting Company, with the exception of a stay of execution. Upon this judgment a writ of error was allowed on April 21, 1825, which was discontinued by the plaintiff in error at May term, 1829.

Also, a bill in chancery, now pending in the common pleas of Hamilton county, filed by the Bank of the United States and William Lytle, against the Cincinnati Manufacturing Company, the Miami Exporting Company, Davis, Findlay, Wheeler, and Avery, setting forth the assignment of said mortgage, and of the judgment of Lytle and Avery, against the Cincinnati Manufacturing Company, to the bank; and also all the proceedings of the Miami Exporting Company, and of Davis, Findlay, and Wheeler, in relation to their respective judgments against the Cincinnati Manufacturing Company, and praying a sale of the mortgaged premises for the benefit of the judgment of Lytle and Avery, and an injunction against the Miami Exporting Company to restrain them from enforcing their judgment against the mortgaged premises.

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Also, the answer of the Miami Exporting Company asserting their rights to a preference, by virtue of their prior judgment against the Cincinnati Manufacturing Company.

The order for the distribution of the moneys in controversy was made on November 16, 1829, the same day on which the land was sold.

No bonds were given upon the allowance of the writs of error upon the judgments against the Cincinnati Manufacturing Company.

The judgment of the Miami Exporting Company was revived on December 24, 1829.

*Upon this state of facts the court below ordered, that after [465 discharging the judgment of Hafer, the balance of said moneys should be applied to the discharge of the judgments of Davis, Findlay, and Wheeler against the Cincinnati Manufacturing Company, and the Miami Exporting Company against the Cincinnati Manufacturing Company, in preference to the judgment of Lytle and Avery against the Cincinnati Manufacturing Company; to which order the Bank of the United States, assignees of Lytle and Avery, excepted, and sued out this writ of *certiorari*.

CASWELL and STARR, for the plaintiffs in *certiorari*.

STORER and FOX, on the same side.

WORTHINGTON, contra.

By the COURT:

The assignees of Lytle and Avery, having purchased the real estate in controversy, upon an execution in their favor, regularly issued and levied, are entitled to retain the purchase money, and apply the same as a credit upon their judgment, unless some other subsisting, paramount claim is interposed.

The pretensions of the several applicants are to be considered.

First. It seems agreed by all parties that the judgment of Hafer is entitled to priority; and may, therefore, be laid out of the question.

Second. The judgment of the Miami Exporting Company, being older than the judgment of Lytle and Avery, is entitled to a preference over the latter, unless that preference has been lost by the

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lapse of time, or laches of the party. It appears that the last execution issued by the Miami Exporting Company was on June 19, 1823, the sale upon which was set aside at the August term following. The judgment was revived on December 24, 1829, more than five years from the date of the last execution, and from the time 466] the sale thereon was set aside. The sale, which *produced the moneys in controversy, was made on November 16, 1829; and the motion to distribute the moneys was made and granted on the same day, and more than one month *before* the judgment of the Miami Exporting Company was revived. So far, therefore, as the Miami Exporting Company are concerned, the only question is, whether a senior judgment creditor, who has issued no execution for more than five years, is entitled to moneys made by a sale upon a junior judgment.

By the common law, a plaintiff could not have execution upon a judgment after a year and a day passed; but he was put to his action of debt upon the judgment. 2 Inst. 469; Co. Lit. 290-296. But by St. W. 2, 13 Ed. I. 45, he might have a *scire facias quare executionem non*, etc. If this statute was in force in this state, it is now abrogated by the statute, in which our legislature have undertaken to act upon the same subject matter; and they have, in effect, prevented the issuing of executions, either *fi. fa. et lev. fa.* or *vendi.*, by declaring that after the expiration of five years it shall be lawful to maintain an action of debt, or sue out a *scire facias* upon judgments, etc.

At common law, if a *fi. fa.* were issued within the year and day, and *nulla bona* returned; or an *elegit*, and no execution thereon, there might be another *fi. fa.*, *elegit*, or *ca. sa.*, several years after, without *scire facias*, if continuance were entered from the first *fi. fa.* or *elegit*. 1 Inst. 230; 4 Inst. 271; Str. 100; 4 Com. Dig. 143. This principle of the common law was also abolished by our statute, which provides, that if five years intervene, after the date of one execution, before another is sued out, then debt or *scire facias* may be prosecuted, etc.

It is a well-settled rule, that an execution issued upon a dormant judgment, will be set aside on motion, and the goods or money levied, restored to the judgment debtor; and sometimes with costs. 2 Wils. 82; Tidd's Prac. 935; 3 Caine, 370; 2 Saund. 71-74. The reason of this rule is, that after the year and day, the law presumes the judgment satisfied; and it will not permit the judgment debtor

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to be disturbed by an execution, without a *scire facias*, or other legal process.

*This rule of the common law, and its reason, apply with [467 equal, if not greater force, to cases under our statute, where five years elapsed and no execution issued; or where five years elapse after the date of an execution before another is sued out. But it is urged that the injunction obtained by the Cincinnati Manufacturing Company takes the case out of the operation of this rule.

It was formerly held, that if the plaintiff had been tied up by injunction for a year and day, he could not take out execution without a *scire facias*. 6 Mad. 288; 1 Str. 301; Bac. Ab., Exec. But this principle has been overruled, and it is now held, that he may afterward sue an execution without *scire facias*. 2 Burr. 600; 2 Saund. 72.

In the present case, however, the injunction was dissolved, and the bill dismissed in May, 1823; and more than five years having elapsed from that time, as well as from the date of the last execution, the party is in the same situation as if the injunction had never been allowed, or any execution issued.

It is also claimed, that the writ of error prosecuted in 1825, removes the necessity of suing out execution within five years from the date of the last execution.

If the defendant brings a writ of error, and the judgment is affirmed, the defendant in error may take out execution after the year, and without *scire facias*; because the writ of error was a *supersedeas* to the execution, and the defendant in error must wait until it be determined. 5 Rep. 88; Bac. Ab., Exec. 362; 2 Saund. 72.

But by the express provisions of our statute, vol. xxii. 70, no writ of error shall operate as a *supersedeas*, until bond and security are given. Notwithstanding the allowance of the writ of error, therefore, the Miami Exporting Company were at full liberty to sue out execution upon their judgment. No bond was executed, and of course there was no *supersedeas* to the execution.

Admitting, then, that the judgment of the Miami Exporting Company was originally valid, a point upon which we intimate no opinion, it was dormant, and no execution could have regularly issued upon it, at the time the order of appropriation was made in the court below. It necessarily follows that the moneys in *controversy can not be applied to discharge such a judg- [468

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ment. The law presumes it to have been paid; and that presumption must be rebutted by an action, or a *scire facias*. Had an execution issued on the judgment of the Miami Exporting Company and the money made, the court, on motion, would set aside the execution as irregular, and restore the money to the judgment debtor. It would be an anomaly in the administration of justice, to apply money raised upon a junior judgment to the discharge of a senior judgment, when, if the same money had been raised upon the senior judgment itself, the court would set aside the execution and award a restitution of the money.

3. The claims of Davis and others, rest upon the same grounds as those of the Miami Exporting Company with one exception.

On November 11, 1823, an execution was issued on the judgment of Davis and others, upon which a sale of the real estate was made by the sheriff, on December 15, 1823, which sale, with the valuation, was set aside *by consent* on September 3, 1829.

Whatever may have been the rights of Davis and others, on September 3, 1829, as to the sale upon their execution, they were then lost by their voluntary appearance in court and consenting that their own purchase should be set aside. More than five years had then elapsed since the date of their last execution, and they were bound to know that they could issue no other execution without *scire facias*. The law presumes that the sale was set aside, because the debt had been paid or released; and if such be not the fact, the plaintiffs must attribute their loss, if any there be, to their own acts. It has been settled in this court, that if a levy be set aside, the parties stand in the same situation as if no levy had ever been made. 2 Ohio, 400. We see no reason why this principle should not be applied to a sale upon execution voluntarily set aside by the parties; the execution upon which the sale had been made was *functus officio*; no subsequent steps could be taken to enforce the collection of the judgment without a new execution; and no new execution could be sued out because more than five years had elapsed since the date of the last execution.

The judgment of Davis and others, therefore, was entitled to no share of the money in controversy.

469] *It is unnecessary to settle the question, whether the judgments of the Miami Exporting Company and of Davis and others have lost their priority of lien upon the real estate, or whether the purchaser under the judgment of Lytle and Avery holds the

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lands, discharged of the prior incumbrance of those judgments. We are satisfied that the Miami Exporting Company and Davis and others, are not entitled to the moneys in controversy; and if they have any other rights, we leave them to be asserted in such manner and form as the parties may be advised.

Order reversed.

GEORGE LIEBY v. THE HEIRS OF LUDLOW AND C. PARK.

Where any matter is properly triable at law, and has been there tried and decided, equity can not interfere, to correct the decision, where no fraud has been practiced by the successful party, and where no accident prevented a full and fair trial.

The power of administrators to sell the real estate of their intestate for the payment of debts, is strictly a legal power. If a sale be made, the question is triable at law; and when, at law, it has been decided that no authority existed, equity can not set it up.

If a person advance money to pay the intestate's debts, no lien is thereby acquired upon the lands of the intestate, in the hands of the heir.

An agreement to indemnify a warrantor against his covenant of warranty, can not injuriously affect the warrantee, or give him ground of complaint against the parties to such agreement.

THIS was a bill in chancery, to which the defendants demurred generally. It was certified here, for decision, from the county of Hamilton.

The bill charged that the complainant purchased from Culbertson Parks three different but contiguous pieces of ground, now situate within the limits of the city of Cincinnati. The first in 1812, the second in 1813, and the third in 1818, for which he paid a full and fair consideration, and received regular conveyances, with covenants of warranty; that he entered into possession of the same at the time of purchase; had made valuable improvements, and had ever since continued in possession; and that at the time of the several purchases, he had no notice of any claim, or pretended claim, of any person whatever.

The bill further stated, that on December 10, 1810, the said Parks had purchased the tract of land, of which complainant's purchases were part, at a public sale, for a full and fair value, from

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the administrators of Israel Ludlow, deceased, under orders of the court of probate, a court of competent jurisdiction, which orders, at the time of purchase, were in full force and unimpeachable.

It further charged, that in the month of May, 1804, when the first order was made for the sale of the real estate of Israel 470] *Ludlow, on the application of his administrators, the tract of land purchased by Parks was without the limits of the city of Cincinnati, and wholly unimproved; that Ludlow, at the time of his death, in January, 1804, was largely insolvent; that the outstanding debts greatly exceeded the amount of personal assets and of the then value of the real estate; that the administrators, in consequence of the order for selling the real estate, made terms for delay with the creditors, by reason of which the estate was extensively benefited, and a considerable property divided among the children and heirs of Israel Ludlow, the defendants in the case.

The bill further charged, that the heirs of Ludlow had prosecuted an ejectment against Parks, for a tract of twenty-seven acres, of which the complainant's grounds were part, upon which they had recovered a judgment in the Supreme Court of the state, and threatened to take out a writ of possession, and dispossess the complainant.

The bill further charged, that subsequent to the recovery in ejectment, J. D. Garrard, one of the defendants, had entered into a covenant with C. Parks to indemnify him upon all his covenants of warranty, for sales of parts of said twenty-seven acres, by way of compromise of the dispute, which compromise operated as a fraud upon Parks' covenant to complainant.

The bill also alleged, that the plat of the city, used at the trial of the ejectment, to prove that the twenty-seven acre tract in dispute was, in May, 1804, within the limits of the city, was entirely erroneous; and that a true copy, made part of the bill, shows that said ground, at the time stated, was not within the limits of Cincinnati, as it then existed.

All the documents referred to were made exhibits; and the prayer was for a perpetual injunction, for a release of the title, and for any benefit complainant might claim of the covenant with Parks.

The order of the probate court of May, 1804, referred to in the bill, is in these words:

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"Administrators of Israel Ludlow, deceased, exhibit an account current of said estate. John Ludlow and James Findlay sworn, and pray order to sell the real estate, to satisfy the debts, etc. Court grant the prayer of the administrators **excepting and re-* [471 *serving the farm and improved lands at Cincinnati, with the houses and lots in Cincinnati.*"

The order of December, 1810, also referred to, is in these words: "*December 17, 1810. Petition of the administrators of Israel Ludlow, deceased, etc., for to sell real estate to satisfy the demands, etc., which this court grant.*"

The covenant between Garrard and Parks referred to is in these words:

"Memorandum of an agreement made and entered into this twenty-sixth day of January, in the year of our Lord one thousand eight hundred and thirty, between Culbertson Parks, of the city of Cincinnati and State of Ohio, of the first part, and Jephthah D. Garrard, of the same place, witnesseth: That the said Culbertson Parks, for and in consideration of the covenant of the said Jephthah D. Garrard, hereinafter mentioned, covenants and agrees to and with the said Jephthah D. Garrard, his heirs, executors, or administrators, that he will make and execute to the said Jephthah D. Garrard, his heirs and assigns, on demand, a deed of release or quitclaim to the following described property in the city of Cincinnati, to wit: A certain part of lot number one hundred and four, in Cincinnati, as the same is now occupied by Robert Kennedy and William Conclin, measuring about thirty-eight feet on Main street, and running back to the alley about one hundred and ninety feet. Also, a certain other lot, bounded as follows: North by Third street, as extended; east by a lot occupied by George Lieby; south by Second or Columbia street, extended; and west by the section line of the seventeenth fractional section, on which the city is in part laid out. Also, a certain other lot, bounded as follows, to wit: North by Fifth street; east by the division line between the said Parks and a lot of twenty-seven acres, late the property of Ormsby and Stanley; south by Third street, extended; and west by the east line of a lot heretofore sold to Messrs. Phillips, Tatem, and Speer, excepting therefrom so much of said lot as was heretofore deeded to Caleb Fagely. And the said Culbertson Parks covenants and agrees to and with the said Jephthah D. Garrard to deliver up to the said Garrard the

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quiet and undisturbed possession of the said premises, above mentioned, whenever the same shall be demanded. *And the said Jephthah D. Garrard, on his part, covenants and agrees to and with the said Culbertson Parks, his heirs, executors, or administrators, that he will indemnify and save harmless the said Culbertson Parks, his heirs, executors, or administrators, on all of his, the said Parks', covenants contained in certain deeds, heretofore made to George Lieby and others, for parts of a twenty-seven acre lot, which lie between Third street and the Ohio river; which said parts of the said lots have been recovered from the said Lieby and others, in an action of ejectment, by the heirs of Israel Ludlow, deceased, in the Supreme Court of the State of Ohio. And the said Garrard further covenants and agrees to and with the said Culbertson Parks, his heirs, executors, or administrators, that he will pay all the costs that may have accrued on the suits for the said twenty-seven acre lot, and the said lot on Main street, in the Circuit Court of the United States, and in the court of common pleas and Supreme Court of Hamilton county and State of Ohio, as the same shall be taxed by the clerks of the said courts. And the said Garrard further covenants and agrees to and with the said Culbertson Parks that he will pay the fees that may now be due and owing by the said Culbertson Parks to his counsel, Messrs. Benham, Este, Wright, Caswell, and Starr, provided they do not exceed five hundred dollars in all; and if they exceed, in the aggregate, the sum of five hundred dollars, the said Parks is to pay the excess. And the said Garrard further covenants and agrees to pay to the said Parks the sum of one thousand five hundred dollars upon the delivery of the deeds of release, and the quiet and undisturbed possession of the premises, by the said Parks to the said Garrard. And the said Garrard further covenants and agrees to and with the said Culbertson Parks, his heirs, executors, or administrators, that he will indemnify and save harmless the said Culbertson Parks, his heirs or assigns, against any and every claim which the heirs at law of Israel Ludlow, deceased, may have against the following tract or parcel of land, now in the possession of the said Parks, to wit: Beginning at the intersection of Fifth and Mill streets, thence eastwardly with Fifth street to the west line of a lot deeded by the said Parks to Phillips, Tatem, and Speer; thence south with their line 473] to Third street, extended; *thence with Third street to

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the east line of Mill street; thence with Mill street to the beginning.

"In testimony whereof, the said parties have hereunto set their hands and seals, the day and year first above written.

"C. PARKS, [Seal.]

JEPTEAH D. GARRARD. [Seal.]

"Witness: DANIEL GANO."

"It is the agreement that this article is in no manner to affect the recourse of the said Parks upon his deed from the administrators, for the said lots.

J. D. GARRARD."

Recorded February 22, 1830.

Cincinnati, June 17, 1831: "A true copy from record No. 31, page 407."

HAMMOND, in support of demurrer:

This is a bill in chancery, the object of which is to set up in equity, the title claimed under the sales made by the administrators of Ludlow. It is the same case decided by this court, in ejectment between the heirs of Ludlow and Culbertson Parks. 4 Ohio, 5.

The bill, so far as I can comprehend it, assumes three distinct grounds for equitable relief:

1. That the sale was valid at law, but that all the facts were not fully before the court at the trial.
2. That the sale was good in equity, and ought to be aided there, though inoperative at law.
3. That the subsequent arrangement between the defendants, Garrard and Parks, furnishes a separate, substantial ground of equity.

Upon the first point, it is necessary to say but little. The question presented was triable, and was fully tried at law. It is well settled, in this court, that it can not be reheard in equity, without showing that a full and fair trial could not have been had at law, either from the conduct of the opposite party, or by reason of some peculiar feature of the case. 2 Ohio, 21,-24; 4 Ohio, 19, 268, 278. These cases are conclusive upon this point, and are in accordance with the well-established principles of proceeding in courts of equity.

*The second position of the bill seems to be that of asking the aid of the court to sustain the defective execution of a.

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power. The facts alleged in the bill, in any way material to the decision, are the same that were introduced, considered, and decided upon, by the court at law. It is well settled that a court of equity will aid the defective execution of a power, existing in full force, if the transactions were all conducted in good faith. But it can never aid any act, in the nature of extending a power, by setting up the power itself. 2 Ohio, 393.

In the suit at law, the court decided, that the order of 1804 did not confer authority or power to sell the ground in question. The power is the same at law and in equity. If it does not exist at law, it does not exist, and can not be set up in equity. They also decided, that the order of 1810 conferred no power or authority to make the sale. 4 Ohio, 38, 39.

In *Tiernan v. Beame*, 2 Ohio, 392-394, this court decided, that a general order, directing administrators to make deeds upon the contracts of their intestate, was null and void, because unauthorized by the law. An attempt was made to aid the proceeding in a court of equity, but the court refused to interfere, alleging that it would be as regular and proper to apply to the court to grant such an order under the law, as to undertake to set up a power where none existed, but where the parties acted under a mistake, supposing the general order a valid power.

The same doctrine is held in *Wells v. Cowper and Parker*, 2 Ohio, 129, and in *Ludlow's Heirs v. C. & J. Johnston*, 3 Ohio, 575. The two first of these cases were in equity, and the relief sought was refused.

The facts charged in the bill, upon which the third ground of relief appears to be predicated, are these: In January, 1830, Garrard, in behalf of the heirs, and Parks made a compromise, by which Garrard agreed to give up to Parks a great part of the ground in dispute; to pay him a sum of money, and to indemnify him on his warranty; or, in other words, to pay the amount that the vendees of Parks might recover of him. This compromise is charged in the bill to be a fraud upon the covenants of war-
475] ranty from Parks. As at *present advised, I am unable to see how this position is to be made out. The complainant's action against Parks, should he be dispossessed by the heirs of Ludlow, could not be affected by this compromise. His remedies are left untouched by it. Lieby is no party to the compromise, and none of his rights are touched by it. The judgment was in full

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force, and its effect is neither lessened nor increased by the compromise. So far as I can see, the compromise gives him advantages. In the first place, it leaves Parks in possession of property to pay any damages which the complainant might recover. But for this compromise, he would have been thrown penniless upon the world. And in the next place it would secure to the complainant the additional responsibility of Garrard to pay these damages. For, as the covenant with Parks is made with the view to the claims of his vendees, I think it possible that a court of equity might interfere, if necessary to secure them the benefit of it. But, until I am apprised of the grounds upon which the complainant's counsel rests this part of the case, I am too much in the dark to discuss it. From all the light before me, I think the demurrer ought to be sustained.

GAINES, contra:

The object of the bill, filed in this cause, was to enjoin the heirs of Ludlow from dispossessing the plaintiff of eight acres of land, in Cincinnati, purchased by him from Culbertson Parks, who had conveyed to him the same, at various periods, by deeds of general warranty, the first of which was executed in 1812, and the last in 1818. Parks had purchased twenty-seven and six-tenths acres with other land adjoining, at a sale made by the administrators of Israel Ludlow, on December 13, 1810. The administrators, who were Mrs. Ludlow, the mother of said heirs, John Ludlow, their uncle, and General James Findlay, the friend of their father and mother (together with Sineas Pearson, who died in a short time after his appointment as administrator), were qualified on February 2, 1804. Said Israel Ludlow died on January 21, 1804, *insolvent*, but leaving a considerable amount of property, both real and personal.

*At May term, 1804, of the common pleas or probate [476 court of Hamilton county, the said administrators, after ascertaining that the personal estate of said intestate was sufficient to pay only a very small portion of his debts, applied to the said court for an order to sell the real estate. The application was granted, and an order made that the administrators should sell the lands belonging to said estate, excepting, however, the farm and improved lands near Cincinnati, and the house and lots in said town.

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The administrators, however, did not sell the lands embraced in this order, and ultimately purchased by said Parks, as above stated, until they had procured from said court a second order, which was made on December 17, 1810, four days after the sale had taken place. The territorial law of 1795 was in force at the death of said Ludlow, and remained in force until June 1, 1805, when the repealing act of February preceding took effect. In this latter act, nothing was said upon the subject of authorizing administrators to sell the lands belonging to the estates of their intestates. An act was, however, passed in 1808, giving such power, and was in full force when the sale was actually made.

The sale was to the highest bidder, fairly conducted, and the land in question brought, if anything, more than its then value. The purchase money was paid by Parks, and applied by the administrators to the payment of said Ludlow's debts; a conveyance made to Parks, who went into the actual possession, and subsequently sold the eight acres to the plaintiff, as above stated.

The amount paid by the plaintiff, as a consideration for the part then purchased by him, was sixteen hundred dollars, upon the reception of which, said Parks made him conveyances, with general warranty. The plaintiff went into the actual possession, made valuable improvements on said eight acres, and has remained in possession ever since. The bill alleges that the plaintiff had no notice, actual or constructive, of any claim or pretended claim of the said heirs, until the institution of their action of ejectment, some few years since, against said Parks, to recover said twenty-seven and six-tenths acres, in which suit, himself and others were

477] also made defendants. *It also averred that the said court of common pleas, or probate court, was, at the date of both of said orders, a court of *competent jurisdiction*; and that said orders had never been set aside or reversed by writ of error or appeal, but yet remain in full force. It is also stated that the primary object of the administrators was, if possible, to save a surplus of said insolvent estate for said heirs; and to accomplish this object the term of administration was extended to the unusual period of fifteen or sixteen years, so that the lands of said estate (being mostly in Cincinnati or its immediate vicinity), might have time to rise in value; that the creditors were pressing with their respective demands, some of which were founded upon sales of *lands* to said Ludlow, but which he had failed to pay for in his lifetime; and,

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that among the claimants, were some who had instituted suits and obtained judgments. And, finally, that by pursuing the above course, and by obtaining indulgence from the creditors by the advances by said Findlay (one of the administrators), of his own money, the said heirs, so far from being *injured*, were *benefited* to the amount of eight or ten thousand each, which was ultimately saved for them from the wreck of said insolvent estate. The bill also charges that the said heirs exhibited a spurious map or plat of said city, at the trial of their action of ejectment, in which plat, the western boundary of said city was colored at the "section line," which included within the said city the said twenty-seven and six-tenth acres, when the boundary, really at "*Western Row*," would exclude it, and bring it within the first-mentioned order of court, which was confined to unimproved lands out of said city. It was also stated that after the trial of the ejectment suit, in which said heirs succeeded, Jephthah D. Garrard, who had intermarried with one of them, entered into a compromise with said Parks, and stipulated to indemnify him against the covenants of warranty to the plaintiff, which act was charged as a fraud upon the said covenants. The prayer of the bill was for special relief, by perpetuating the injunction, and giving the plaintiff the benefit of the said compromise, which might result from the indemnity from said Garrard to Parks, and for general relief.

*The heirs of Ludlow filed a general demurrer to the bill. [478

The demurrer of the defendants takes the bill upon its face and denies the plaintiff's claim to relief. It therefore admits as true all of the allegations of *fraud* in exhibiting the spurious plat of the town, and thereby obtaining the advantage at the trial of the ejectment suit; it also admits the competency of the probate court to make the orders of May, 1804, and of December, 1810, and that those orders are yet in full force and unreversed; that the estate of their ancestor was *insolvent* at the time of his death; that the administrators acted fairly and honestly throughout the whole course of their administration, and with a view of promoting the interest of said heirs, and that the latter were *benefited* and not injured by the course pursued; that the said Parks was the highest bidder at said sale, paid the purchase money, and received a deed from said administrators; that his conduct was fair and honest; that the plaintiff was, at the time of *his* purchase and receiving the several conveyances from said Parks, as well as at the time of

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paying the purchase money to said Parks, entirely ignorant of any claim, or pretended claim, of said heirs to the land in controversy; and finally, that he, the said plaintiff, was a *bona fide* purchaser without notice. These, and the various other allegations of the plaintiff, are admitted by the demurrer.

The plaintiff relies upon the following grounds in opposition to the demurrer, and in support of the bill:

First. That the orders of the probate court of Hamilton county, at May term, 1804, and December term, 1810, being the orders of a court of *competent jurisdiction*, can not be *collaterally impeached*; but if those orders, or the proceedings of the administrators under them, were, in anywise, irregular or defective, the corrective should have been a writ of error, or some other proceeding pointed out by law, for the correction of erroneous acts of judiciary tribunals.

Second. That the plaintiff, having purchased said lots of land, paid the purchase money and received conveyances, when entirely ignorant of any claim of said heirs afterward set up by them; and finally, that at the time of said purchase, payment, and conveyance, the said orders being in full force, he should be protected as the *bona fide* purchaser without notice.

479] **Third.* That the heirs of Ludlow being *benefited* and not *injured* by the sales, since complained of, have no right to disturb the purchasers, who acquired their lands at those sales.

Fourth. That the law of 1795 being in force when the said Ludlow died, and when the trust of the said administrators was undertaken, should be considered as the only law which was applicable to the estate in question, and that, therefore, the subsequent repeal of that law, in 1805, could not affect an administration commenced under it, but unfinished at the time of its repeal.

Fifth. That a court of equity will not countenance the making of a contract, such as that between Parks and Garrard, to the prejudice of the rights of the plaintiff, who held the covenants of the former, stipulating to warrant and defend the title to the land in controversy, and that Garrard, by voluntary assuming the liability for Parks' covenants of warranty, is bound in *equity* to do, under the responsibility thus assumed, all that Parks was bound by his said covenants to have performed, in the absence of any compromise whatever.

Upon the first point it is unnecessary to say anything more.

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than that the *credit* universally recognized, as being due to the orders, judgments, and decrees of a court of competent jurisdiction, until set aside by the same court, or reversed by an appellate court, is now *for the first time* questioned by the defendants' counsel. The demurrer admits that the court of probate, at the respective dates of the orders in question, was one of competent jurisdiction, and that those orders have never been set aside or reversed by any *direct* proceeding.

But were this fact denied, I reply that article 3 and section 5 of the constitution of Ohio will settle the question as to the general probate powers of the said court, held independently of legislative enactments, and the territorial law of 1795, which was in force at May term of the court, in 1804, when the first order of sale was made, and the act of 1808 was in force at December term, 1810, when the latter order was made, unless it be conceded (as I contend) that the law of 1795, as to administrations, *commenced under it, and not finished until said term in [480] December, 1810, was in force at the last-mentioned period. Both of those laws authorized the said court to order the sale of real estates of intestates, upon the representation of the administrators to the court, and the fact appearing to the satisfaction of the judges, that the *personal estate* was insufficient to pay the debts, etc.

Upon this point turned the *jurisdiction* of the said court to make the orders in question; and the forms prescribed as to the manner of making the sales, etc., were merely directory to the court and the administrators; but the non-observance of those forms did not render the sale *void*, because the legislature, in making the law, did not so declare it. *Thompson v. Tolmie*, 2 Peters, 157, and cases cited; 7 Johns. 485. "It is not in the power of either the judiciary or legislature to render nugatory an existing judgment of a court of competent jurisdiction." 2 Bin. 41; 3 Bin. 54; 2 P. Wms. 491; 2 Bro. Ch. Cas. 400; 5 Ves. Jr. 423; 1 Cowen, 622, 711; 9 Mass. 124; 11 Mass. 227; 2 Bibb, 401, 518; 3 Bibb, 216; 10 Serg. & Rawle, 262; 2 Mon. 140; 3 Ohio, 305.

Upon the second point, see 3 Ohio, 332. "A party having title to land, under a decree in chancery, conveys in good faith *before citation in error is served*, the purchase's title is not affected by a reversal of the decree."

The order or decree under which Parks purchased has never been set aside; and therefore the equity in favor of the plaintiff,

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who purchased from Parks, while there was an unreversed order of sale, or which is the same thing, an unreversed decree on record, is much stronger than the case above cited. Indeed, the doctrine of protecting the *bona fide* purchaser is so well settled that it would be a waste of time to quote authorities in its support. See, however, *Contherland v. Brush*, 7 Johns. Ch.; 2 Johns. Ch. 190.

Upon the third point it may, with truth, be observed that neither the constitution nor laws of the United States, nor of any state in the Union, contemplate redress for *benefits* received, when unaccompanied with any *injury* whatever. You may in vain search the books of precedent, both legal and equitable, for a declaration or a bill, the complaint of *which is predicated on an act highly *beneficial* to the party complaining. Big. Dig. 248, sec. 1; 11 Mass. 379.

Upon the fourth point. The law of 1795, being in force when Ludlow died, remained, as to *his* estate, until the administration commenced under it was finished. All laws are prospective in their operation; and it therefore follows, that a law passed subsequent to the death of an individual, prescribing duties to administrators, etc., could not be construed to have been intended for the direction of those who had been already proceeding under a former law. If such a construction were to prevail, great inconvenience, as well as incalculable injustice, might be the consequence; and it will not be an answer, to say that the administrators alone are concerned. Suppose that the repeal of a law takes effect just before a sale, commenced under that law, has been completed, and a very different mode of proceeding is pointed out as a substitute; or suppose the mode of foreclosing a mortgage by *scire facias* should be repealed without a saving clause, just after a suit by *scire facias* has been commenced under the law in force at the time, would the repeal affect the suit thus commenced, in the latter case, or the sale in the former?

Upon the fifth point. I appeal to the understanding of any man who knows the nature and obligation of a general warranty deed, and ask him, if A. for instance holds the deed of that character, executed to him by B., in consideration of ten thousand dollars, and C. covenants to indemnify the latter against his covenants to the former, can C. immediately turn A. out of possession, by vir-

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tue of a judgment against B., for land, including the land of A., which is the subject of indemnity?

In conclusion, it may be observed that the matters relied on in support of the bill are of such a character as to have been inapplicable, or at least of very doubtful application, in support of the general issue, in the action of ejectment. The plaintiff's title depended, in that action, upon that of Parks, the accidental wrong recital on the face of which latter excluded it from the jury. The fact of the plaintiff being a *bona fide* purchaser, without notice, as well as the other facts *here relied on, could not have [482] availed under the consent rule which bound him to insist on the legal title only.

The plaintiff's remedy was, therefore, in equity alone, where he could avail himself of all matters material in defense of his title.

GARRARD, in reply:

In our opening argument, we gave (as far as could be gleaned from the bill) what we supposed were the propositions intended to be relied upon, to support the complainant's claims to relief. We now have the argument of the complainant's counsel before us, which leaves us where we commenced, with full liberty to guess at his object. No distinct, definite ground for equitable relief is set forth in the bill. The bill is a novel jumble of facts, argument, and assertion. The argument now furnished as a commentary upon the bill, is its parallel in contradictory assertions and positions. All the orders of the court of common pleas, which are referred to in the bill, and which are attempted to be set up in chancery to sustain the title of the complainant, are predicated upon the fact that the estate of Ludlow was solvent, but that there was a deficiency of *personal estate only*. Upon no other *predicate* could those orders ever have been applied for or granted. The laws of 1795 and 1810 did not contemplate the granting of such orders in cases of *insolvency*. There were other statutes regulating cases of insolvency, which required a different course of proceeding. Now it seems to us, that if these orders are set up and sustained as the foundation of the title of the complainant, they must be left to stand upon the reasons and state of fact upon which they were made by the court of common pleas; and that the *insolvency of the estate*, as set forth in the bill, is wholly inconsistent with and repugnant to the real foundation of the title, as derived

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from the administrators. The view, however, which we take of the case, does not require an exposition of the inconsistency of the various grounds which the bill and argument assume.

We shall call the attention of the court to the three propositions, which we supposed to present the whole matter of the bill.

433] **First.* That the sale was valid at law, but that all the facts were not fully before the court at the trial. The trial at law is fully reported in this volume of the Reports, page 5, and there it will be seen that the whole case was fully presented and decided. The bill contains a general charge that the trial was unfair, and that the defendant was precluded from making his defense; but no facts are charged in the bill, or insisted on in argument to show how the trial was unfair. It is not pretended that they were taken by surprise in any one single legal proposition, upon which the heirs predicated their right to a recovery. The whole grounds of their claim had been discussed time after time, and were fully known to both parties. In making out the charge of an unfair trial at law, the counsel ask if the heirs did not object to the whole of Parks' evidence, and exhibit a spurious town plat to show that the order of 1804 did not cover the ground in dispute?

We answer, unhesitatingly, that the deed of Parks, together with the orders of 1804 and 1810, were objected to by the plaintiff's counsel as illegal evidence of title, and their objection was sustained by the court. But what does this prove? That the trial was unfair and fraudulent? That the court were in an error? That the defendant was taken by surprise? Admitting all that is charged *in the way of argument*, we can not see how the party can be relieved in equity upon the ground of an unfair trial at law, when no fact is disclosed from which the charge can be inferred.

It is said that a spurious town plat was given in evidence; but with what truth the assertion is made, the report will show. The subject matter of this charge was made the ground of a motion for a new trial with others, and the opinion of the court, by Judge Hitchcock, will demonstrate its validity, admitting it to have been true. It will be seen, by a reference to that opinion, that throwing the plat, and all the matters connected with it, out of the question, the verdict was sustainable upon other and sufficient testimony, which was not even questioned upon the trial of the cause on the circuit.

In the further support of this ground of relief, it is asked if the

insolvency of Ludlow, the fairness of the sales, and *the [484 benefit received by the heirs could be given in evidence in the action of ejectment, and because they could not, it is argued that the trial was unfair and fraudulent. It is certainly true, and this court required no reference to authorities to convince them that such matters could not be given in evidence; but it certainly was not the result of any fraud or unfairness on the part of the heirs of Ludlow at the trial. The rejection of such evidence should rather be attributed to the sound judgment of the court, upon the rules of evidence, which are too stubborn to accommodate themselves to every man's grievances.

If, in truth, the complainant has real meritorious grounds for equitable relief, which could not have availed him at law, the court will interfere in his behalf; but it seems to us that this ground may, and does often exist, where there is neither fraud nor collusion in the trial at law. They are distinct grounds for equitable interference, and the existence of the one does not imply the presence of the other. Whether the matter stated in the argument be such as would justify the interference of a court of equity will be considered under the second proposition.

We maintain that the trial at law was a fair and full trial of the whole cause; that nothing calculated to elucidate the origin, nature, and validity of the complainant's title, was withheld or excluded by the act of the heirs of Ludlow, and we appeal to the report of the case to sustain us upon this ground. There is no fact disclosed either in the bill or argument that looks like fraud or unfairness in the trial. The general charge is fraud and unfairness, and the proof supplied, in the way of argument, is that the counsel for the heirs objected to illegal evidence going to the jury, and the court sustained them; that, by the rules of evidence, the defendant was precluded from using incompetent testimony, and thus defrauded out of a fair trial.

Second. The second proposition is that the sale was good in equity, and ought to be aided there, although inoperative at law.

Upon what ground will a court of chancery interfere to aid the title in this case, which has been pronounced invalid at law? A court of equity can interfere upon one of two principles only.

**First.* To aid the defective execution of a valid power, re- [485 sulting from accident, mistake, or fraud.

Second. Or to create and set up a power where none existed,

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because the administrators might have clothed themselves with authority.

The right and duty of courts of equity to interfere in cases where a valid power has failed in the execution, through fraud, accident, or mistake, is readily admitted by us; and all the cases to which the court have been referred by the complainant's counsel are of this character. The judgment at law, now sought to be enjoined, was not obtained because of a defective execution of a valid power, resulting either from fraud, mistake, or accident.

The recovery in ejectment was had solely upon the ground that the administrators acted without authority. That they had not clothed themselves with authority to sell the land in dispute. The title was in the heirs at law, and could be divested only in the mode pointed out by the statute. The question, therefore, was, have they been divested? That question has been settled in the negative, without involving, in its determination, the doctrine of courts of equity concerning the defective execution of powers. The case was presented, and turned upon the question of the existence of a power or authority in the administrators to make the sale. No authority could be found or produced. The order of 1810 was after the sale, and that of 1804 excluded the premises in dispute from its operation. The deed stood, then, without any foundation to support it. It was held to be null and void, and the plaintiffs entitled to recover.

If a court of chancery can aid in this case, upon the equitable principle of assisting and supplying defects in the execution of a valid power, let us see what is the defect, and in what did it originate. The orders must be kept in view, and the inquiry directed to matters arising subsequent to their creation by the court of common pleas. What has intervened in their execution which this court can correct? Has there been a mistake in the description of land sold and deeded, so that the deed does not embrace it? If so, the court can grant relief. Had the land been sold under a proper authority, and the administrators died before the 486] money *had been all paid, and the deed executed, a court of chancery would decree a conveyance, and thus perfect that which had been prevented by accident. Had the administrators sold one tract, and received a full consideration, and fraudulently induced the purchaser to accept a deed for a different and less valuable one, a court of chancery would have granted relief. And

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so throughout the whole class of cases, where the proper and fair execution of a power has failed through mistake, accident, or fraud.

No mistake has arisen since the granting of either of these orders, that can be laid hold of to sustain this bill. No accident has happened to defeat the execution of the orders. No fraud is imputable to the defendants in this bill, by which the complainant has lost any of his rights, or his interest is prejudiced.

The whole difficulty is antecedent to the sale and the date of the contract. The mistake consisted in the administrators supposing that they had authority to sell, when, in fact, they had none. This is a mistake which a court of chancery can not relieve against. The case of the complainant is not an uncommon one. He has gone into the market and purchased of parties, not professing to sell their own title, but the estate of others, for whom they were acting, under special and peculiar circumstances. He failed to inquire into the validity of their authority, and has paid his money upon a mistaken consideration. It turns out that those of whom he purchased had no right to sell. He now applies to a court of chancery to declare that a valid power which the law did not recognize, and which has been decided to be invalid. Under the pretense of aiding the defective execution of a power, the attempt is made to create a power, for the want of which his title failed to protect him in the suit at law. No case can be found, we apprehend, that sanctions such a doctrine; at least, we have not been able to lay our hands upon it. None such has been referred to by the counsel for the complainant.

The doctrine of courts of chancery interfering to aid the defective execution of powers has frequently been before this court; and it seems to have been distinctly apprehended in several of the reported cases. In *Tiernan v. Beame*, 2 *Ohio, 393, the court [487] lay down the rule in its fair and proper extent. They say: "Chancery may aid a deed rendered inoperative by *accident* or *mistake*, when the GRANTOR had power or authority to convey, and intended to do so; but it can not generally supply the want of authority. It can not give effect to deeds executed by persons who have neither title nor authority to convey from those who have the title. The deed, from the executors of Newman to Beame, was *unauthorized and illegal*. Its operation was not prevented by a defect in the form, or in the execution of it, but by a *total want of power to convey, which no court of equity can supply*. A decree may remedy a

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mistake in a conveyance by a person having power to convey, but it can not *create a power*. The statute has pointed out the only method by which executors or administrators can obtain power to sell real estate, or to execute contracts for the sale of it, made by their testators or intestates. It is necessary to pursue that course, in order to obtain the power; and an attempt to convey before they have done so, must be wholly inoperative."

The case of Nowler, Douglass, and others v. D. L. Coit, 1 Ohio, 522, is, perhaps, as strong a case as could be presented to a court of chancery, to induce them to act upon the principle insisted on in this case, by the counsel of the complainant. That was the case of a sale without authority, by administrators. The heir at law, instead of proceeding by an ejectment as he might have done, to recover the possession, filed a bill in chancery, calling upon those claiming under the administrators' title, to discover the nature and character of their title, and asking the court to decree it to be delivered up to be canceled, and the possession restored. The defendant, in his answer, set forth the origin of his title, which was under the order of a tribunal without jurisdiction, and by his answer, in the nature of a cross-bill, he prayed that in the event the court should decree his title to be void, he should have his purchase money and interest, his taxes, costs, and trouble of paying them, etc., refunded to him, and to decree them to be a lien on the land till paid by the complainant. If there be any foundation in principle or precedent, for the doctrine now contended for by the complainant's counsel, why did not the court, in that case, say to the 488] heir at law, *you have come into a court of equity, and must, therefore, do equity; this land has been sold, and the proceeds applied to the payment of debts, which were a charge upon this land in your hands. It is true that the court had no authority to order the sale in question, but this court are satisfied that another tribunal might have made the order, and that the land might have been correctly sold; therefore, it is decreed that your bill be dismissed. The defendant did not ask this of the court, he only asked to have his money refunded; but even this the court refused, because no court of chancery could undertake to decree the heir at law to refund money paid to a third person, upon a mistaken consideration. The right of the purchaser to recover his purchase money, the court say, can not be litigated with the heir, either at law or in equity.

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In the case of *Wills v. Cowper and Parker*, 2 Ohio, 129, the same doctrine is laid down by this court, where they refused to enforce the specific performance of a contract, though fair and equitable, because made by an administrator without proper authority, and, therefore, inoperative and void.

In such cases, the fairness of the sale—the payment of the purchase money—the hardship of the case upon the purchaser, and the illiberality of the heir who seeks to recover his estate, are matters which can, by no safe and settled rule of equity, enter into the consideration of the case. It is a question of authority or power in the vendor to do the act in controversy; and, although the want of power in the vendor may bring hardship on the purchaser, it must be recollected that the heir at law was no party to the transaction, and none of its consequences are justly chargeable to him. 3 Ohio, 332.

If the orders of court are of any avail, it must be at law, and not in a court of equity. If invalid at law, they are the same in equity.

The second ground talked of for the interposition of the chancellor is, that because there was a necessity to sell, and a proper authority might have been obtained for that purpose by the administrators, the court ought to sustain the sales without any order. It is even contended that the existence of *the law itself, [489 without any order, would furnish a substantial ground upon which to sustain the sale. Such, however, has never been held to be sound law by this court.

The statute has always required something to be done by the court of common pleas, and much has been confided to their discretion; and to dispense with their duties, in such cases as the present, would lead to endless confusion and mischief. It is not difficult to see why it is argued that the sale would be valid, without an order; and why the statute should be considered merely directory to the court and administrators; and why, in the event of injury to the heir at law, he should be turned over to the administrator and his security.

If the order was a valid power, and so defectively executed that the purchaser should, in order to protect his title, be compelled to go into a court of equity, he would have not only to show a valid authority, but that such authority had been fairly performed. If, instead of demurring, the defendants had answered and denied that the sale was in accordance with the requisitions of the statute

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of 1810, under which *alone* the title could be made out, would not the complainant have been compelled to show that the sale was consistent with all the material requisites of the statute? Enough is disclosed upon the face of Parks' title, under whom he claims, to authorize a court of equity to lay hold of the case, upon the application of the heirs of Ludlow, and declare the sale a fraud. The circumstances, then, made manifest upon the face of their own title, furnish a key by which it is perceived why this ground of defense is assumed for the complainant.

If the fact that there was a necessity to sell, and that there was a law which would, under certain circumstances, and upon certain conditions, have authorized a sale, be held sufficient ground for the interference of a court of equity, we are at a loss to know upon what principle it is to be supported. If such be a tenable proposition, then there is no necessity for an administrator, order, or deed, in the transfer of an intestate's estate, when he dies indebted. Whoever is most convenient, and has the means, may step in, pay off the debt, take possession of the estate, and enjoy 490] it unmolested. *If the rightful owner assert his title at law, and recover, all that would be necessary to enjoin the judgment, would be to file a bill, show the fact that the estate was in debt, and that there was a law authorizing a sale to discharge the debts, and that those debts had been paid by the person in possession. No inquiry could be instituted whether the sale was fair or agreeable to the conditions of the statute. Such is the legitimate extent of the proposition maintained by the complainant's counsel, when he talks about the insolvency of Ludlow, the fairness of the sale, and the benefit resulting to the heirs at law.

The whole predicate of such a proposition is at war with the title as really derived to the complainant. His title has failed upon its real merits, for the want of a power in the administrators. That want of power can not be supplied by a court of equity. Nor can the want of such a power be evaded by an attempt to show a state of facts, which, if true, could not be consistent with the title as already claimed by complainant.

The third and last ground of relief set forth in the bill is predicated upon the compromise between Parks and the defendant, Garrard. A copy of that agreement is referred to and made a part of the bill, and the matter of complaint is that by it a fraud is practiced upon the covenants of Parks to George Lieby. Upon

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this subject we have nothing more to say than was said by us before. We then gave our views of its real consequences to Lieby. We waited for the argument of his counsel to throw some light upon the subject, and show how Lieby was injured. He was no party to the contract, nor was his name introduced into it with any other view or intention than to fix the real amount which the defendant Garrard should pay to Parks. Parks had conveyed to Lieby a part of the land in dispute in the action of ejectment; by that judgment Parks had not only lost his own, but his liability to refund to Lieby was fixed. The question with him was, what shall be done? This judgment not only sweeps him of house and home, and turns him penniless upon the world, but it leaves him without the power to refund to others, who had purchased of him. In this situation he applied to the defendant, Garrard, for a compromise. *One was entered into, by which Parks is left with [491 an estate worth twenty thousand dollars, by which he is enabled to answer all demands against him. By this compromise he does not attempt to prejudice the rights of Lieby, who was his co-defendant. He does not attempt to surrender up any portion claimed by Lieby. He does not deprive him of any legal or equitable defense, or throw the slightest impediment in his way. Parks seeks to purchase his own quiet and independence. Without the stipulation on the part of Garrard to indemnify him, he would, upon the execution of the judgment in ejectment, be harassed upon his covenants to Lieby. The amount of these covenants are, therefore, assumed by Garrard with a reference to Parks only.

But this is a contract to which Lieby is a stranger, both in contract and in interest. He is no party to it. It was made without reference to him, except as matter of description in fixing and identifying Garrard's liability. Lieby is made neither better nor worse, except as Parks' responsibility is made more sure by increasing his available means. And this, we apprehend, is strange matter for which to infer fraud upon Lieby.

Opinion of the court, by Judge COLLET:

Does the complainant, in his bill, state such facts as will authorize this court to enjoin the proceedings in the action at law? The complainant, by his bill, relies for relief on three grounds:

1. That there is a plat, in the clerk's office of Hamilton county, which shows that the land in dispute was situate beyond the

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bounds of the town of Cincinnati, when the order to sell lands, of May term, 1804, was made by the court of common pleas; and, consequently, as it was unimproved, was embraced by that order; whereas, on the trial at law, the plat exhibited in evidence was erroneous, and showed that the premises in controversy were situate within the town of Cincinnati at the time the said order to sell was made, and, consequently, not embraced by that order.

2. That the sale of the land was necessary for the payment of 492] the debts due from the estate of Ludlow; that it was fairly made by the administrators for its full value, and the purchase money all appropriated to the payment of the debts due from the estate of Ludlow.

3. That the agreement of Garrard and Parks, referred to by the bill, is a fraud on the covenants of Parks, contained in his deeds to the complainant for the premises, and an equitable bar to the recovery of the premises by the heirs of Ludlow.

As to the first ground for relief. The title of the complainant depends on the orders of the court of common pleas directing the administrators of Ludlow to sell the property, and on the compliance, on the part of the administrators, with the orders and the law, in effecting the sale to Parks. Of the authority to vest this power to sell, and of the compliance with the law and orders, in perfecting this sale, the court of law had jurisdiction to inquire; and further, the court of law did make this investigation. Whether the court of law erred in opinion is not a proper subject of inquiry for a court of equity, nor whether a fair and impartial trial was had at law, unless the complainant shows clearly to the court that he had a good defense at law and was prevented from availing himself of it, by fraud or pure accident, without any fault or negligence of himself or his agents. 2 Pet. Cond. 518.

That an erroneous plat was used on the trial, showing that the premises were situate within the town of Cincinnati, at the time the order to sell land, of May term, 1804, was made; that the premises were then unimproved; that there is a correct plat in the clerk's office of Hamilton county, showing that the premises were not within the town of Cincinnati at that time, if its production would probably have altered the verdict, is not a sufficient showing to authorize this court to grant relief.

If the erroneous plat was fraudulently made, and imposed on the court at the trial, by the heirs of Ludlow, or the complainant

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was prevented, by fraud, from using the correct plat, the bill should state how the fraud was practiced, what fraudulent acts were done or words spoken. If he was prevented by accident, the bill should state how: as that the complainant or his agents did not know of the plat in the clerk's office of Hamilton [493 county, in Cincinnati; or if they did know that there was such a plat, that they did not know where it was until after the time within which they could have moved the court of law to grant a new trial.

Should this court enjoin this judgment, and order a new trial at law, because a fair trial had not been had, it must order a new trial in every case where the defendant may, in general terms, allege fraud in the plaintiff in obtaining the verdict against him, and that there existed evidence which would probably change the verdict. From their feelings, defendants would do this with a pure conscience in most of the cases where verdicts are against them. Hence courts of chancery, before they order a cause reheard at law, require that the complainant should show that he used due diligence in preparing and conducting his defense at law, but that he was prevented from then making it, by circumstances beyond his control. 3 Johns. Ch. 350.

The second ground for relief is, that the sale of this land was necessary for the payment of the debts due from the estate; that it was fairly made for full value, and that the proceeds of the sale were appropriated to the payment of the debts due from the estate.

As to this, the title to or lien on the land, in behalf of the complainant, if it exists, is strictly legal, and must arise from the authority of the court of common pleas to issue the orders referred to by the bills of the complainant, and from the compliance of the administrators with those orders, and the law, in making the sale of the premises to Parks. 2 Ohio, 393. Those inquiries have been made by the court of law; it has been there decided that the sale was without authority; and that the complainant's title was therefore defective. The complainant, if he had purchased directly from the administrator, could not have a lien on the land in controversy superior to that of any other person who had furnished the administrators with money to be appropriated to the payment of the debts due from the estate; and which they had so appropriated. This would not create a lien on the lands inherited

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by the heirs from the intestate. 1 Ohio, 522; 3 Ohio, 332. If the 494] complainant has a right to recover *any part of the purchase money paid by Parks to the administrators of Ludlow, the administrators must, undoubtedly, be parties to the suit. 1 Ohio, 522. That the complainant has made valuable and expensive improvements on the premises, does not authorize this court to enjoin the proceedings in the ejectment for the recovery of the premises. The right of a defendant in ejectment to recover payment for the improvements he has made on the premises recovered of him, is given by the occupying claimant laws; the rules and mode by which the amount shall be ascertained, are prescribed by these laws, and the proceedings are all required to be in the court of law in which the ejectment is tried. The law does not give to this court jurisdiction in such cases. The remedy at law is as plain and as adequate as the legislature chose to make it.

3. That the agreement of Garrard and Parks is a fraud on the covenants in the complainant's deeds from Parks, and entitles the complainant to relief against the judgment at law. The agreement of Garrard and Parks can not injuriously affect the rights of the complainant. It does not place him in a worse situation in respect to his rights of recovery of the purchase money and interest of Parks, since the complainant did not assent to it. If the covenants contained in the agreement of Garrard and Parks, to indemnify Parks against his covenants of warranty with the complainant, can operate as an estoppel to prevent Garrard, or the other heirs of Ludlow, from setting up their legal title to the premises, it would be by giving to these covenants of Garrard an effect not probably intended by Garrard and Parks at the time they made them. This court will not sustain a bill to extend the operation of an agreement beyond the intention of the parties when they entered into it. It will, in many cases, sustain a bill to prevent its being so extended. Estoppels are not favored by courts of law, and less by court of chancery. Whether this article can have this operation in a court of law or not, this court will not determine, nor will it sustain a bill to give it this effect.

Upon this whole case, this court is clearly of opinion that the complainant's bill does not state such facts as would authorize 495] *the court on the hearing, if they were all proved, to decree for the complainant. The bill must, therefore, be dismissed at the complainant's costs.

W. DENNISON v. PHI. ALLEN.

A subsequent purchaser from a mortgagor can not be let in to redeem against a purchaser under a judgment on *sci fa.* on the elder mortgage, though not made party to the proceeding.

THIS case was adjourned here for decision from the county of Hamilton. It was a bill in chancery, by the purchase of an equity of redemption, to redeem the mortgaged premises, in the lands of a purchaser under the mortgagee. Various matters were introduced into the bill and answers, which it is deemed unnecessary to state, because the decision turned upon a single point, which arose on the following state of case:

On May 15, 1815, Cyrus Coffin mortgaged the premises in question to P. Allen, as a collateral security for Coffin redeeming certain other grounds previously sold to Allen, subject to a mortgage. On February 2, 1816, Coffin sold and conveyed to Dennison the lot thus mortgaged to Allen, and Dennison took possession. Subsequently, Allen sued a *sci. fa.* against Coffin, on the mortgage, without making Dennison, or the *terre* tenants parties. At May term, 1821, judgment was rendered on the *sci. fa.* in the usual form, for five hundred and fifty-five dollars and fifty-nine cents; and on April 6, 1822, the lot was sold upon execution, and purchased by Allen for three hundred and forty-seven dollars. The other defendants were purchasers under Allen.

Fox, for complainant:

The *scire facias* on a mortgage is in the nature of a bill to foreclose, and is substituted for it, and it seems well settled that no person is bound by a decree of foreclosure, in chancery, except parties to the suit.

*Chancellor Kent, in 3 Johns. Ch. 450, after examining all [496 the authorities upon this subject, says: "The rule, therefore, has been well settled, and uniformly supported, that the subsequent incumbrancers must be parties, and, if omitted, the decree will not bind their rights." "The injustice that would be produced, if they were to lose their rights, because they are not made parties, is very apparent." In the case in Johnson, a mortgage had been made in 1804—a decree of foreclosure was had on this mortgage

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September 21, 1815, and a sale made November 23, 1815. But another mortgage was made in March, 1808, and the second mortgagee, not having been made a party to the proceeding to foreclose the first mortgage, was entitled to redeem the property from the purchaser, under the decree in 1815.

So it was decided in 15 Johns. 316, that notwithstanding a decree of foreclosure and sale, under the decree, a person having purchased the mortgagee's interest, before the commencement of the foreclosure suit, and not being made a party to the proceedings, *was not affected by the decree of foreclosure and sale under the decree*, but might afterward show that the mortgage on which the decree was founded was void on the grounds of usury.

Again: In 4 Johns. Ch. 606, it is laid down that "all incumbrancers existing at the commencement of the suit must be made parties, or else their *rights will not be affected by the decree and sale thereon.*"

Again: In Hunt and others v. Wickliffe, 2 Peters, 215, it was decided that a decree obtained in Kentucky, on a publication made for eight weeks, to bring parties into court, could not bind the parties against whom this publication had been made, because the Supreme Court of that state had decided such publications must be made for two calendar months. Under this construction of the act, the court say: "The heirs of John Floyd were never before the court, and the decree was made against persons who were not parties to the suit. It can not affect them."

In the present case, therefore, admitting that a *scire facias* would lie on such a mortgage, it is contended that, in order to bind other persons interested in the estate mortgaged, they must be made parties to the *scire facias*, in the same manner 497] *as terre-tenants have to be made parties to proceedings at common law, to charge lands in the hands of heirs.

In Nance et al. v. Hollenback, 1 Serg. & Rawle, 540, 548, it is decided that any terre-tenant, who has not been served with process on the *scire facias* to foreclose, may, on an ejectment by the purchaser under the judgment, give in evidence anything which might have been given in evidence in the *scire facias* suit.

But the right to redeem, is not only secured by the principles of chancery practice and general principles of law. The statute has provided, in express terms, that nothing in the act shall affect the right of any person or persons, who may set up any claim to such

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mortgaged premises, by purchase from or under the mortgagor or otherwise, and which claim is paramount to the claim of such mortgagee; nor shall anything contained herein be construed to prevent such claimant from availing himself of any defense that the mortgagor *might or could* have set up in bar, or discharge of such mortgage, or of *any fraud or collusion* between the mortgagor and mortgagee."

It does appear to me, therefore, that so far from the statute taking away any rights which others might have in the mortgaged premises, in consequence of any sales made upon any one mortgage, great care has been taken to inform all purchasers under *scire facias* sales, that they can only claim the property subject to the rights of others.

STORER, for respondents :

The provisions of the several acts of the different legislatures of this state, on this subject, are similar in their terms, and were borrowed from the Pennsylvania statute, which was passed in 1705.* By section 6 of this act, which was adopted by the governor and judges of the territory northwest of the Ohio, in 1795, and is to be found at page 18 of the Maxwell code, the *scire facias* was only to be served upon "the mortgagor, his executors, or administrators; and that when the premises were sold on execution under a judgment in *scire facias*, the purchaser should hold the same clearly discharged, and freed from all equity and *benefit of redemption, [498 and all other incumbrances made or suffered by the mortgagors, their heirs, or assigns." This, then, was the law of the territory until 1802. In 1802, section 2 of the act then passed "gave to the purchaser the whole title, freed and discharged from all equity and benefit of redemption of such mortgagor." In 1803, the act then passed does not contain the provision just quoted.

The act of 1810 is also silent on the subject, as to any expression of the right of the purchaser to hold the property discharged of the equity of redemption. But the necessary conclusion from the remedy itself, and the right it confers, unquestionably is, that the whole title is passed by the sheriff's sale; and this construction has been adopted by the Supreme Court of this state, in *Reedy v. Burget*, 1 Ohio, 159. It is there said by the court, "that the object of giving the *scire facias* was to enable the mortgagee to resort at once, in one action, to the recovery of his debt and the subjection of his

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landed security to the satisfaction of it. This proceeding enables the mortgagee to obtain judgment for his debt, and execution against the mortgaged premises, at the same time; upon which execution the premises are sold, *discharged of the equity of redemption*, which, without such proceeding, could not be levied upon and sold *upon an execution on a judgment at law*." This construction is but the history of the practice in this state under these laws.

Under the statute of Pennsylvania, I can find no case, in any of the reports of that state, from Addison down to volume 17 of Sergeant & Rawle, that conveys the least hint that the junior incumbrancer should be made a party.

The practice seems to be, that the junior lienholder applies to the court for his claim from the surplus moneys arising from the sales of the mortgaged premises, after the elder liens are discharged.

As in *Whitehill v. Houston's Ex'rs*, cited by Yates, judge, in *Blunfield et al. v. Buddle et al.*, 1 Yates, 189: "The premises were sold on a *levari facias*, on the first mortgage, and a surplus of near eighty pounds remained after paying the first mortgage and costs. It was ruled that the second mortgagee might take the money out of court, on giving security."

499] *And, so in *Emlin's Ex'rs v. Bogg's Adm'rs*, 2 Yates, 167: "The surplus money, arising from land sold under execution on a judgment recovered on a mortgage, after satisfying that judgment, was appropriated to a younger purchase from the mortgagor."

I conclude, then, that the law of 1810 did not require the junior mortgagee, or lienholder, to be made a party to the *scire facias* sued out by the first mortgagee—that the sale on the execution discharges the land of the equity of redemption, no matter in whom the right exists, and the complainant in this bill has no claim to the relief he seeks.

By the Court:

We conceive that the provisions of our own statute are decisive of this case. By section 2, vol. xxii. 232, it is provided, that on a judgment in *sci. fa.* "a writ of *levari facias* may issue, whereon the mortgaged premises shall be taken in execution and disposed of, in the same manner and under the same regulations that lands and tenements are, or may be, disposed of for the satisfaction of judgments." Conformable to these regulations, the land must be valued by sworn appraisers, must sell for a propor-

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tionate part of that valuation, the money must be paid to the sheriff, and the sale must be confirmed by the court, and a deed ordered to the purchaser. Section 4 provides that the proceedings shall not "affect the right of any person or persons who may set up any claim to such mortgaged premises, by purchase from or under the mortgagor, or otherwise, and which claim, in law, shall be paramount to the claim of such mortgagee." There seems no ground of doubt but that the legislature, when they made this provision, intended that interests not paramount to that of the mortgagee, such as interests subsequently derived from the mortgagor, should be concluded by the proceedings on the *scire facias*. We think these two sections, taken together, must be so interpreted as to place the purchaser, at sheriff's sale, under the judgment on the mortgage, in the position occupied by the mortgagor when the mortgage was executed. Any other construction would convert the judicial proceedings authorized by the law, into a means of practicing fraud on the purchaser. It [500] would discourage bidders at sheriff's sales, lessen public confidence in titles held under sheriff's deeds, and prevent the improvement of lands so held. This seems to have been the construction of the Pennsylvania courts upon a law of similar import. And the same construction appears to have prevailed in Ohio. This is the first bill we recollect filed by a subsequent purchaser from the mortgagor, to be let in to redeem, against a purchaser at sheriff's sale, under a previous mortgage. Had such bills been thought maintainable, we should have heard of them before. The bill must be dismissed.

JAMES GOODLOE v. CITY OF CINCINNATI.

When the corporation of a town acts illegally and maliciously, to the prejudice of an individual, an action on the case, for damages, may be sustained against such corporation.

THIS cause was adjourned here for decision, by the Supreme Court of Hamilton county. It was an action on the case, for an injury done to the real estate of the plaintiff.

The declaration states that the plaintiff, prior to the injuries received, was seized and possessed of a lot of land (describing it by

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number), and a brick house thereon, situated on the north side of Water street, in the said city; that he, the plaintiff, had expended large sums of money in erecting the walls of his said house, in placing a cellar under the same, in fitting and accommodating the doors, windows, cellar, and every part of his said house for the convenience and accommodation of himself and family as a place of residence; and for the same purpose, and at like expense, had paved the said street and side-ways thereof, next to and adjoining his said dwelling, as well for the accommodation of his said family, as for the convenience and accommodation of those with whom they held intercourse. To make the said conveniences complete, and render the house valuable for the purposes intended, its doors, walls, windows, ways, walks, etc., were all finished with an express view to the level and grade of said Water street, as pre-501] viously made by the defendants. That *the defendants, while the plaintiff was so enjoying his house and lot, maliciously and without cause, etc., dug up and destroyed said street, pavements, ways, etc., to the depth of five feet; took and removed the stone, earth and gravel, etc., by reason of which the walls of his house were injured, his cellar destroyed, and himself and family deprived of the use of his house, etc.

The defendants demurred generally, and the cause was adjourned for decision on the demurrer.

Fox and STOREY, in support of the demurrer:

As a general principle it is admitted that an action of trespass on the case will lie against a corporation for all acts of *nonfeasance*; but for acts of *misfeasance* in a corporation, the right to sue must depend upon the peculiar circumstances of the case. The present defendants, who compose the corporation of Cincinnati, by the law of 1827, which was in force at the time of the acts complained of, were authorized "to cause the streets, lanes, alleys, and commons of the city to be *kept open* and in *repair*, and free from all kinds of nuisance." "They have the power to appoint supervisors of the *highways*, and the exclusive control and care of such streets." The right, then, to enter upon, to improve and repair the public highways, by her agents and servants, must be conceded to the city; and having thus a right to act, a discretion is necessary, on the part of these agents, in order to act efficiently.

The power thus conferred is a beneficial one; and to effect fully

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the object for which it is given, great liberality of construction is due whenever its exercise is called in question. We therefore conclude that in all cases where a corporation, similar to the present, is sued for a *misfeasance*, it must appear in the declaration that the act for which reparation is sought was either negligently or maliciously done. It must also appear what the injury is, its nature and extent.

Let us inquire, in the first place, what power was delegated to the city, and how far their officers and agents are to be protected in its exercise. The right to direct all public improvements is wisely confided to the city council, who *may legislate upon [502 the matter, with a full knowledge of the necessities, as well as of the resources of the community. This right implies, and, in fact, supposes a liberal discretion to be employed by those who are called on to act. In the laying out of new, and in the repair of old streets, many circumstances must exist to determine the conduct of the corporation as to the extent of the work to be performed as well as the mode in which it is to be executed. The public health may require that the sewers should be constructed on a different plan from that hitherto followed. The cleanliness, convenience, and safety of the public, may require that the streets should be widened, their surfaces graduated, and various alterations made, which can be understood by those only to whom the immediate charge is given. Having these duties to perform, it would follow that any change in the structure of the pavements, any excavations in the streets, any alterations in the sewers, would be a legitimate exercise of power, subject, however, to the supervision of a court of law, whenever the injury is wantonly done, or the jurisdiction of the corporation is exceeded.

In the case of the Governor and Company of the British Cast Plate Manufacturers v. Meredith and others, 4 D. & E. 794, it is decided that when an act authorizes commissioners to pave, by reason of which an individual is injured in his property, and there is no excess of jurisdiction on the part of the commissioners, neither they nor their servants acting under them are liable for such injuries. Lord Kenyon discusses the question on the only safe and just ground upon which it can be placed. He says: "That where the officers do not exceed their jurisdiction, no action will lie. Some individuals suffer an inconvenience under all these acts of parliament; but the interests of individuals must

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give way to the public accommodation." And Judge Buller, in the same case, says: "There are many cases in which individuals sustain an injury for which the law gives no remedy; for instance, pulling down houses, or raising bulwarks for the preservation and defense of the kingdom, etc. This is one of those cases to which the maxim applies: '*Salus populi, suprema est lex.*' If the thing complained of was lawful at the time, no action can be sustained against the party doing the act."

503] *In *Sutton v. Clarke*, 6 Taunt. 42, the action was against the trustees under a turnpike act, for cutting a drain through certain lands. The consequence was considerable damage to the plaintiff's estate; yet it was held that the defendants, acting within their jurisdiction, and according to the best of their information, could not be answerable for the consequences of their acts.

In *Harman v. Tappenden et al.*, 1 East, 555, it was held, "that an action does not lie against individuals, for corporate acts, erroneously done, from which injury happens to the plaintiff, unless there is evidence of malice."

In *Steele v. The Western Island Lock Navigation Company*, 2 Johns. 286, the court decided, if the company, in making the canal, acted under the authority of a legislative act, unless they exceeded their jurisdiction, no action would lie against them for any damages occasioned by the cutting of the canal.

In *Cosser v. The Corporation of Georgetown*, 6 Wheat. 593, where a bill was filed to prevent the corporation from cutting down a street, by the plaintiff's land, on the ground that the street had already been graduated, and improvements made accordingly, it was held that the corporation had a right to fix the grade, whenever, in their discretion, it should be deemed proper. Chief Justice Marshall observes: "There can be no doubt that the power of graduating and leveling streets ought not to be capriciously exercised. Like all powers, it is susceptible of abuse, but is trusted to the inhabitants themselves, who elect the corporate body, and who may, therefore, be expected to consult the interests of the town." The whole opinion of this eminent man is full to the point for which we contend.

In *Callinder v. Marsh*, 1 Pick. 418, the Supreme Court of Massachusetts decided, "that a surveyor has authority, by the statute, to dig down or raise a street; and if he does it with dis-

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cretion, and not wantonly, a party injured can not maintain a suit against him, nor any other person." In this case the action was brought against the defendant, for digging down the street by the plaintiff's dwelling house, in Boston, and taking away the earth, so as to lay bare the foundation walls of the house, and endanger its falling; in *consequence of which the plaintiff [504] was obliged, at great expense, to build up new walls, and otherwise secure the house, and render it safe and convenient of access as before. The defendant justified as *surveyor* of the *highways*; and under his general power to act as *such*, he committed the act complained of. Chief Justice Parker very elaborately examined the matter in dispute, and came to the conclusion already referred to. He answers, it seems to us, every objection, and establishes his decision upon the soundest arguments as well as the clearest authority.

Having thus explained the right and power of the defendants, not only from the reason of the thing, but by adjudged cases, we will inquire, in the second place, how far the plaintiff has entitled himself to recover by the facts stated in the declaration. The authorities already cited, establish the principle, that unless the power is abused, or the jurisdiction exceeded, no action will lie.

The plaintiff alleges, "that defendant entered upon the street adjoining his premises, and by his agents and servants, cut down, and dug, and tore up the same to the depth of six feet; whereby the *sidewalk* has become *useless*, his house materially *injured*, his cellar ruined and made unhealthy, and liable to the influx of water, and the convenience of passing and repassing destroyed." It will be seen there is no allegation of *malice*, or of *negligence*, or of an *abuse of power* on the part of the defendants; and as these constitute the gist of the action, they must be averred, or no case is made.

In *Harman v. Tappenden et al.*, 1 East, 555, an action on the case for depriving plaintiff of his office of a freeman, in the company of "*Free Fishermen*," the judges expressed great doubt as to the propriety of a suit against the corporation, and explicitly held, that unless there was an allegation of *malice*, on the defendants' part, no action could be maintained. Lord Kenyon and Justice Lawrence declare, that no error of judgment can furnish grounds for a suit; and decide the direct point, that the defendants can not be made liable, unless they acted willfully and maliciously.

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In *Barnardiston v. Soune*, 2 Levinz, 114, an action against the sheriff of Suffolk for maliciously intending to deprive the plaintiff of the office of knight of the shire, it was held by 505] *the three judges, that if the return was *maliciously* made, the jury ought to find for the plaintiff, which they did. The judgment was afterward reversed in the exchequer, notwithstanding the allegation in the declaration that the act was done "*falso et malitiose et ea intentione*," 3 Levinz, 30; and the last judgment affirmed in parliament. 1 Lutwich, 89. It is said that this decision gave rise to the statute 7 and 8 W. & M. 6, 7, which gives an action against the returning officer, for all returns *willfully made*, and for *double returns, falsely, willfully, and maliciously made*.

In *Drewe v. Colton*, 1 East, 162, in note, the same question was fully examined, and the court arrived at the same conclusion.

In *Matthews v. The West London Water-works Company*, 3 Camp. 402, negligence was expressly averred.

In *Jenkins v. Waldron*, 11 Johns. 114, an action was brought against the inspectors of an election, for refusing the plaintiff's vote; and Judge Spencer, in reversing the judgment of the court below, says: "It is not alleged or proved that the inspectors *fraudulently* or *maliciously* refused to receive the vote; and this we conceive to be absolutely necessary to the maintenance of an action against the inspectors of an election."

In the case of *Chestnut Hill and Spring House Turnpike Company*, plaintiffs in error, v. *Rutter*, 4 Serg. & Rawle, 6, where an action was brought for stopping a watercourse belonging to defendant in error, the allegation against the company was: "They did *wrongfully and unjustly erect and set up* certain *jetties and piers*, by reason whereof, the water was thrown back, etc. After verdict, Chief Justice Tilghman says: "We are bound to presume it was proved that the defendants were *in fault* in the manner of erecting the piers." Again, he says: "Granting that they would not be responsible for damages *unavoidably resulting from a bridge built in the best manner, and obstructing the passage of the water no more than was necessary* for its proper construction, it would not follow that they should not be answerable for damages arising from a bridge so *carelessly and inartificially* built as to occasion an *unnecessary and wanton* obstruction."

506] *In the case of *Leader v. Moxon*, 3 Wilson, 561, the court held the commissioners for *pavements* responsible, as they had

acted *arbitrarily* and *oppressively*. In *Clarke v. Foote*, 8 Johns. 329, it is said that it is a lawful act for a person to *burn* his *fallow*, and if his neighbor is injured thereby, he will have a remedy by action on the case, if there be sufficient ground to impute the act to the *negligence* or *misconduct* of the *defendant* or *his servants*.

In *Panton v. Holland*, 17 Johns. 98, where an action was brought to recover damages against the defendant for digging in a lot contiguous to the plaintiff's premises, whereby the foundation walls of his house was *subverted*, etc., the court decided "that no man is *answerable in damages for the reasonable exercise of a right which is accompanied by a cautious regard for the rights of others*, when there is no just grounds for the charge of *negligence* or *unskillfulness*, and when the act is not done *maliciously*."

In the note to *Varick v. The Corporation of New York*, 4 Johns. Ch. 55, the same doctrine is held.

One general principle is held to govern all cases in which corporations or individuals are sued for torts. If they possess the power to act "*prima facie*," their acts are held to be within their jurisdiction, unless the contrary expressly appears. This rule is extended so far, that all judicial officers are protected in the exercise of their duties, being responsible for no error of judgment, and amenable only where their powers are directly abused or clearly transcended. The necessity for this doctrine grows out of the relation which public bodies, as well as individuals vested with authority, sustain to the community. Where power is conferred, and the responsibility of exercising it assumed under high legal sanctions, there can be no presumption of *intentional wrong* on the part of those who exercise that power; an abuse of trust may be proved, but it never can be *supposed*.

There is no general allegation that the corporation have made themselves legally liable in the mode contended for by the defendants, and an examination of the matters set out in the declaration will furnish, it is believed, no grounds from which *malice*, *negligence*, or *excess of jurisdiction* can be inferred.

*It is said a level or grade had once been established by [507] the city; but the power to make, presupposes a power to change. The act is a matter of legislation merely, not one of contract. A moment's reflection must convince us, that the necessities of the community may require frequent modifications of all municipal regulations; and were the progress of public improvement to be

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stayed by suggestions of supposed injury to individuals, the whole system would be greatly *impeded*, if not *destroyed*.

The case of *Gossler v. The Corporation of Georgetown*, already referred to, embraces the whole of this discussion; and it is there expressly said, that if the *corporation do establish a level or grade, it is not unalterable*. So long as they have legislative power, they may alter or change it. It will be recollected, that in the case quoted, the charter of Georgetown fixed the grade as it should be permanently established; and yet the corporation were afterward permitted to change it. It is not averred that the street is dug below the *walls* of the plaintiff's house; that his *walls are injured*, or in what manner the building has become *unhealthy*; nor how the walls are rendered less secure.

There is no direct positive statement of any actual injuries; the whole charge is by way of inference, and refers rather to what is to come than to what has already occurred. On such a charge, the defendant, it seems to us, can not be held to answer.

GAZLAY, contra :

On the legal and universally received maxim, "that for every injury there is a remedy," this cause would be determined with but a moment's deliberation; the only question that could be made, would be the one involving the amount of damages.

The defendants admitting the property of the plaintiff, his rights of enjoyment, and the injury sustained, say that the law affords him no remedy.

And why does the law afford him no remedy? Is it upon account of the peculiar character of the defendants? The peculiar 508] character, or nature of the injury sustained by their act; or any peculiar powers they possess to do that act? It is apprehended that if justification and impunity can not be found under one of these heads, they will nowhere be found.

The character of the defendants is a corporate one; this furnishes no excuse for the commission of an injury; the authorities on both sides of the Atlantic sustain this position. In *Gray v. Portland Bank*, 6 Mass. 364, the court determined that a corporation is liable for wrongs done by itself or agents. In *Townsend v. Susquehanna Turnpike Co.*, 6 Johns. 91, the same principle was recognized. The company were held responsible for the injury sustained by the falling of a bridge. In 4 Serg. & Rawle, 6, we

find the same principle again, in the case of a turnpike company.

The action was in case for an injury sustained to a tanyard by the construction of a bridge, causing the water to flow back upon the tanyard. The action, after full argument of the objection, "that corporations are not liable for injuries of the kind," was sustained, and damages given.

The character of the defendants, as corporators, does not, therefore, clothe them with any legal immunity, in the case before us.

The power of the defendants, as corporators, and the nature of the injury sustained, may conveniently be considered together.

The powers of a corporation in this country arise exclusively from the charter of incorporation. That is, corporations are the creatures of the law, in contradistinction to the common law—or, in the words of the chief justice in the case of *Head v. Armory*, 2 Cranch: "A corporation is precisely what the act of incorporation has made it."

1. What does the law authorize the defendants to do in relation to the matter before us?

Section 12 of the law of January, 1827, authorizes the city to open and lay out streets, lanes, alleys, etc., and saves a compensation to those whose lands or property shall be appropriated. The same section and paragraph make it a duty of the city to keep the streets, lanes, and alleys in repair, and free from nuisance. The first question presented, *is, does the remedy [509] sought for, in the present action, belong to, or arise under this section. Two powers are recognized by this section. The one to open, the other to lay out. Sections 6 and 19 of the act providing for roads, Revised Code, 303, gives the meaning of these terms. Roads are to be laid out on petition by the commissioners, who have no power to open. This latter must be done by the supervisors. They are distinct and separate acts—and, by the state law, confided to distinct and separate officers; but by the charter, both are given to one and the same body, viz: the city.

The State law provides no damages for laying out a road or highway, but distinctly provides for the recovery of damages arising from opening, after being so laid out. The law of incorporation does not say, that the party injured shall be paid for his land or his house, or the decreased value of his property. It uses the words "*land or property*," and "*injury sustained*"—selecting, evi-

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dently, the broadest of terms, those best calculated to embrace every kind of injury, arising from the opening, not from the laying out. This construction accords with the reading of the statute law, one section of which gives compensation for the immediate injury done by opening; and another section, for more remote injuries, such as taking timber, stone, etc.

The provision, allowing the citizen damage for an injury sustained, is a munificent and beneficial one, and must be so construed. Strike from the law, giving power to the city, the authority to *lay out* any new street, lane, or alley, and then construe the power to open the same, as it must be construed in the state law, and all difficulty vanishes. It will then read to this effect, viz: the city may *open* or *dig down* any street, lane, etc.; but any person whose land or property shall have been thus appropriated, dug down, or injured, shall be paid the amount of injury sustained thereby. This construction will make the law consistent with itself, as well as with the principles of the state law, in relation to compensation for injuries done to real estate. If it is not to be so construed, we are obliged to reject, as unmeaning, that clause in the charter, which prohibits the city from the exercise of any [510] power not sanctioned by the constitution and laws of the state. We are also obliged to draw the conclusion, that when a road is opened, under the authority of the township officers, the citizen has rights and remedies, which he has not, if opened under the city authorities. That is, if one lives in the country, and has sustained ever so trifling an injury to his timber, soil, or gravel, the law gives him a remedy; but if he reside in the city, his house may be torn down, his stone and pavements taken away, or his cellar and walls ruined—yet he has no remedy. Such an inconsistency we have no right to charge upon the legislation of the state, in this, if in any case.

It has been contended that the command expressed in the section of the charter now under consideration, viz: "the city council shall cause the streets, lanes, etc., to be kept open, in repair, and free from nuisance," confers on the city unlimited power and discretion to do all and every act which to them may seem fit and proper, and that, too, with impunity. If the city has this power, it is what the general assembly itself, and what no county or township has, or can have. The power, whatever it may be, is a strict and measured one, to be exercised with a view, and a direct view,

to the objects of the grant. It was granted for public benefit, which must embrace private benefit and security.

"*To open*" means cutting and digging, when it applies to a road, or it means nothing. "*To keep open*," is another and different term entirely, and implies or gives no such power. It refers to the word "*nuisance*," strengthens and supports it; and embraces precisely what the terms "*free from nuisance*" will embrace, viz: to prevent the placing in the street, lane, or alley, etc., any impediment to the free and convenient public use of the same. The power to remove nuisances, is so necessary to the public, that in relation to public roads it may not only be exercised by all road officers, but by every private citizen, who is like to be incommoded by the existence of the same. The term "*impair*," appended to "*keep open*," implies nothing more than to replace or amend the defects, occasioned by common use. There is, then, three distinct objects embraced by the act of incorporation: 1. A power to lay out a road. 2. A power to open or dig and cut it fit for use. 3. To keep it open, in repair, and *free of nuisance. The [511 first two are separate and distinct powers, both conferred upon the city by one section, not necessarily exercised at one and the same time, as constant practice has long since determined; under which, the city are every day opening, cutting, and digging out roads, which were laid out long before the act of incorporation. The act complained of, is the opening, cutting down, and digging away of a street. This the city had a right to do; but the statute which confers the right, requires them to pay the damages sustained.

To apprehend correctly the nature or character of the injury, it is required only that we look at the nature and object of the power under which it has been committed. The whole frame of social society rests on the position that single individuals will not and can not do all which their own prosperity and happiness require to be done. Experience has long since determined what portion of the public prosperity can be safely confided to single individual exertion. At this point, and at this point only, do we commence the exercise of public power, and that for the general benefit. We say, practically, that a single citizen is not rich enough, strong enough, or sufficiently munificent to make a road or canal. The public good requires both to be done. The public power is therefore exerted for their accomplishment. But this

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public power must be exerted at the public expense or contribution; if not, oppression and injustice, more than the public benefit, would be the result; and society, barely from the want of it, would dissolve by common consent. The constitution recognizes this principle, when it declares that private property shall be held subservient to public welfare: Provided, etc. Is there, or can there in justice be, any exceptions to the principle?

In a good government are any allowed to imagine a single case where the property of a citizen may be despoiled for the public benefit; and yet that citizen can be compelled to suffer without redress?

And yet the defendants contend that this is not such an injury as, by the principles of the constitution and laws of the land, can be redressed. In other words, if the plaintiff had erected no. 512] house on his lot; had made no pavements or improvements, and the defendants had then laid out and opened the road, he would have been entitled to damage. That is, if they had done the plaintiff but little injury he might have recovered; but having done him a great one, he is without redress.

The defendant also insists that there are authorities which abundantly support the position he takes against the plaintiff. The case of *Callinder v. Marsh*, 1 Pick. 418, is cited as one in point. It is true that the declaration in that is similar to the one filed in this case. Yet no demurrer was put in. There was a special plea, and the defendant escaped under the law of Massachusetts and the particular circumstances of the case. Perhaps the escape was a just and legal one, but the question was not made, or even referred to, viz: whether the law will sanction a recovery in any case, much less whether the laws of Ohio will sanction one.

The case in *Pickering*, like every other case, must be confined to the matter before the court. The defendant plead that he was an overseer, or commissioner of the street, and set forth the object and purpose for which the act complained of was done, which, as far as it can be gathered from the report, was the cutting down and leveling a hill—if not a nuisance, certainly not far short of one. The law, too, as far as we are informed, gave to the commissioner full power to cut, dig, level, and remove everything which was calculated to hurt, hinder, or incommode the use of the highway or street. The power under the law appears to be referred to in express terms, and whatever the commissioner might do ap-

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pears to be named, and that, too, without saving any right to damages. This is certainly a very different case from the one before us. Damages are allowed, it would seem, where new space is taken into the street, or houses taken down, and a party injured thereby.

The argument for the plaintiff went much upon the ground that the power complained of was not exercised by the right officers. Whatever the argument may be, the court, it would seem, place the case on two points, as the turning ones in the cause: 1. The express and particular power given to the surveyor, which enabled him to cut, dig, level, grade, and remove any and every obstacle, or *inconvenience in the way. 2. The proper and dis- [513] creet exercise of this power, as to which the court say, if the power be improperly or unnecessarily used, the aggrieved is entitled to damages. Here, then, is an unanswerable objection to the authority of the case for the defendants. This court have not, and can not have the facts before them on demurrer to the declaration, and until they are produced the court can not say whether the power applies to the case, or whether its exercise has been wanton or indiscreet, or not.

The declaration states that the acts complained of were unlawful and unjust, and done maliciously. The case just cited is, then, directly in point for the plaintiff; as are also the cases cited from 4 Sergeant & Rawle, 6.

In the case from Pickering it is not even contended that the general words, "*repair or free of nuisance*," give power to dig up or level down a whole street.

The question whether a corporation or individual is answerable for damages, when acting within the scope of authority, and in good faith, is not settled by any of the cases referred to. In 4 Sergeant & Rawle, above cited, the court refused to decide it. It can not arise in the case before us, inasmuch as the declaration avers improper motives, and the facts are not before the court.

By the Court:

Whatever may have been the ancient doctrines, with regard to the liability of corporations, for wrongs done by their agents, courts have gradually departed from them, and adopted principles more congenial to the state and condition of the world. Corporations are established in our country for almost every concern of life—

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political, pecuniary, and eleemosynary. They govern towns, construct roads, engage in manufactures, trade in money, build churches, teach schools, and collect and distribute alms. In all these operations they act by agents. Where benefits are derived, the corporation enjoys them. Where injury is inflicted, through their means, they ought to be responsible for it.

When the corporation of a town grades the streets, the object is 514] the benefit of the whole town. If an individual is injured, *it is right he should have redress against all upon whose account the injury was perpetrated. There is no justice in sending him to seek redress from an irresponsible agent. There is no propriety in compelling the injured party to look for compensation to the mere agent, who acted in good faith, according to the directions of his employers. And, when the agent is made responsible, leave him, for indemnity, to the discretion of the corporation.

All corporations act by agencies, and those agencies are composed of men who may be influenced by reprehensible motives, or tempted to do acts not warranted by law. In this case, the act is charged in the declaration to have been illegal and malicious. When a corporation acts illegally and maliciously, we conceive it ought to be made directly responsible. Such is the plain dictate of justice, and we see no technical rule of law that forbids us to act upon it.

The demurrer is overruled.

JESSE SMITH *v.* CITY OF CINCINNATI.

THIS cause was adjourned from Hamilton county, and stood upon the same principle with that of *Goodloe v. The City*, except that in this case the act complained of was not charged in the declaration as *malicious*.

Demurrer overruled.

NOTE.—Both of the foregoing cases were remanded back to Hamilton county, with leave to withdraw the demurrer and plead. This was accordingly done; and the causes were tried, at the last term of the Supreme Court, before Judges HITCHCOCK and WRIGHT, on the plea of general issue. In Smith's case, there was a verdict of two hundred and fifty dollars damages for the plaintiff. In Goodloe's case, there was a verdict for one hundred dollars damages. In both cases, final judgment was rendered for the plaintiffs.

APPENDIX.

[The following case, decided in the Supreme Court of Hamilton county, May term, 1831, before Judges HITCHCOCK and WRIGHT, is reported at the earnest request of the parties, and by permission of the judges.]

PRICE AND OTHERS v. THE METHODIST EPISCOPAL CHURCH AND OTHERS.

Payment of money for burial, in the burial ground of the Methodist Episcopal Church, or burying in virtue of membership, gives no right to control the church in the appropriate use of its grounds.

Lands obtained by religious societies, can not be held as set apart for a burial ground, under the statute, unless actually surveyed, described, and platted. *Quære*, as to the record of the plat.

Lands conveyed to trustees of the Methodist Episcopal Church, for the use of that church, according to its rules and discipline, the trustees can not create any individual or public right, inconsistent with the use prescribed by the discipline.

HAMILTON County Supreme Court, May Term, 1831.

The bill states that a number of individuals, in Cincinnati, associated themselves together, as Methodists; and in 1807 purchased lots of ground, in Cincinnati, for the accommodation and convenience of themselves and others, for a place of worship and burial; and shortly after the purchase, at their joint expense, erected a place of worship, and opened a burial place, in which the members of the society had liberty to bury their dead, free of expense; and others had leave, also, to bury their dead there, on paying certain burying fees to the trustees of said society; and that from thence, hitherto, the said ground has been used as a burying ground. That the complainants and others, some of

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whom are, or were members of the Methodist Church, *used the ground designed for that purpose* as a place of burial for their friends and relatives; and that those who were not members of the society have paid the trustees of said society a valuable consideration for the privilege of burying in said ground; and that they have incurred great expense in erecting memorials and monuments over the graves of their friends. That to secure 516] *the object of said purchase the title of said lots was made to certain trustees and their successors, to be held perpetually for the use of said society, and for objects connected with worship and the burial of the dead. That the defendants have come to a resolution to open and dig in the ground of said graveyard, and have given notice that they will remove the ground, and the remains of the dead therein lying, unless the friends and relatives of the said dead shall remove their remains and monuments from the yard. The complainants pray that the defendants may be perpetually enjoined from digging up the graves in the yard and removing the remains of the dead.

The answers admit the purchase of the lots and the building of the place of worship or church. They also admit that interments have been made in the ground adjoining the church, from time to time, by members and strangers; and that, from some, burial fees had been received; that, in the permitting interments and receipt of the fees, all has been done with the understanding that the ground was to be held and used, when necessary, for the purposes of the original trust. They deny the payment of money by any of the complainants, or that they were ever given any privilege inconsistent with the trust, or promised any; that the only disturbance threatened was in a vote of the society, in the regular course of its business, to erect a new church on the ground; and a determination of the trustees to remove, decently, to some suitable place of interment, such bodies in said burying yard as should be necessary for the convenient building a church suited to the present exigencies of the society.

The title papers, exhibited by the respondents, are:

1. A deed from J. Kirby and wife, dated September 25, 1805, to Lynes and others, trustees, etc., of the Methodist Episcopal church, of ground in dispute, to the grantees and their successors, in trust: "That they should erect and build, or cause to be erected and built, a house or place of worship for the use of the members of

the Methodist Episcopal Church of the United States of America, according to the rules and discipline which, from time to time, may be agreed upon and adopted by the ministers and preachers *of the said church, at their general conferences in the United [517] States of America; and in future trust and confidence that they shall at all times, forever hereafter, permit such ministers and preachers belonging to the said church as shall, from time to time, be duly authorized by the general conference of the ministers and preachers of the said Methodist Episcopal Church, or by the yearly conference authorized by said general conference, and none others, to preach and expound God's holy word therein." The deed then prescribes the mode of filling vacancies and keeping up the number of trustees; and then provides that in case any of the trustees, for the time being, have advanced, or shall advance, or become responsible for any money on account of the premises, they, or a majority of them, after notice to the society, etc., may raise the money by a mortgage or sale of the premises.

2. A like deed from the same persons, dated October 19, 1807, for the same property, on the *same trust*.

3. The society, having been incorporated by the general assembly of Ohio, a deed from Kirby and wife, dated June 13, 1821, of *confirmation* to the trustees, under the act of incorporation, and their successors in office. This deed covers the same property, except about one hundred feet, before sold by the society, and contains the same declaration of trust.

It is proven, amongst other things in the case, that soon after the purchase of this ground, in 1805, interments began to be made in it, and have continued from thence until lately, permission having been occasionally given by the trustees to bury there, and fees taken for the privilege in many cases. That some of the complainants had friends and relatives interred there, and monuments erected to perpetuate their memories. That the ground was never thrown open, or set apart for a public burying ground, though in 1803, about one hundred feet in the northwest corner of it had been laid out in fifteen ranges, a plan for which had been exhibited to a meeting of the society and adopted, as appeared by their minutes, and that since then interments had been regulated by that plan.

*An injunction in this case had been allowed by a single [518] judge, in vacation; and the court was asked, on the case made,

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to exercise its extraordinary power of injunction, to stay the trustees from breaking up the graves and monuments, and disintering the remains of the dead, in the ground held by them as aforesaid.

GAZLAY, for complainants:

The question to be settled, is, whether the complainants have such an interest in the subject of the suit, as to authorize the interference of a court of equity?

Who are the complainants? Some of them are members of the Methodist Church, who purchased the land; some are not, and never were members. None of them claim any legal interest to the land in dispute; but all of them claim an easement, which exists as perfectly without as with membership. This easement the complainants profess to hold without restriction as to time, and free from the let, hindrance, or disturbance of earthly power. This easement is the right to keep and preserve, in the place of their present deposit, the bodies and remains of their deceased friends and relations and to see that these remains, and their accompanying sepulchral evidence, suffer no violation, except from the relentless hand of time.

How came the complainants to this right of easement? It was granted by the trustees, as also by the Methodist Episcopal Society, at the time in possession of the ground. There is no material variation in the testimony upon this point. The ground was purchased in 1805; the church erected and interments commenced at the same time, and have been continued without objections until within two or three years past, when it was seen fit to discontinue them. The regulations on this subject have been made principally by the trustees, one or more of whom gave a written or verbal order for every interment; and since the period of charging a fee for the ground, a book has been kept, in which was entered the name of the person interred, and the sum received for the same. There is no evidence that the society have acted as a body 519] more than once on this subject, which was in 1812 *or 1813, when a meeting was called in relation to some prohibition made by the trustees, as stated in the deposition of John Wood. At this meeting the prohibition was removed. The trustees conformed to the regulation of the meeting, and interments were continued accordingly. There is, then, no doubt but that interments have

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been made on the west halves of lots 18 and 19, on the corner of Broadway and Fifth streets, both by the consent of the trustees and the society. They have been so made for more than twenty years without any objection, and by the general and special consent. The trustees and society have, during all this period, been in the actual possession of the ground, and exclusively controlled the same. Persons who have made interments in the ground have, by general consent, been allowed to place tombs and monuments over the bodies of their friends and relations, and to open their graves and place other bodies therein. The graveyard has been kept in strict inclosure. The answer distinctly admits that the trustees gave notice, as stated in the bill, that if the dead were not removed by a certain day, they (the trustees) would proceed to remove the same.

Is this authority and this usage sufficient to establish the right of *easement* claimed by the complainants? This question is settled by the cases of *Town of Pawlet v. D.*, 9 Cranch, 292, and in *German Lutheran Church v. Beatty*, 2 Peters, 566. The great question settled by these cases is that a legal title is not necessary to the validity of the right in question. It is an easement, or it is a charitable use, such as courts of equity will protect, even in the absence of all legal title. The court, as reported in 2 Peters, make use of the following language, in substance: Here is not a legal title. There is no evidence that any legal title existed. There is no grant—there is no contract for any. But here is a *dedication* of the ground to charitable or religious purposes, an easement is permitted. It has been enjoyed with the knowledge and consent of all the parties concerned. The purposes are sacred ones. This court will, therefore, protect the claimants in their enjoyment. To present the case in as favorable a light as possible for the defendants, we will suppose that Kirby had made no deed; but had barely permitted *the complainants and others to enter [520 upon the ground, erect a church, and lay out a burying ground—was present, and knew, and did not object to any of the improvements made, and this for more than twenty years. Under these circumstances, were Kirby the defendant, could he avoid the easement? Under these decisions, we say he could not, much less the defendants do so. They have purchased the ground by their trustees, for the benefit of the Methodist Society of the United States, on which to erect a church as a place of worship. To ac-

commodate members of this church, and promote their prosperity and increase their growth, they lay out and open a burying ground; to increase their funds, they sell to strangers the right of interment. For more than twenty-four years the ground has been devoted to these objects. No objections have been made. On the contrary, the objects have been sanctioned both by the trustees and the society. The complainants are both members and strangers, and include as well those named in the bill as others claiming the same right. It now does not lay in the mouths of the trustees or society to object to the use they themselves have made of the ground. They can not dispute or gainsay their own act and authority. Kirby himself could not object, were he a party.

The Methodist discipline has been referred to by defendants. This can have no bearing on the case, unless it can be shown that the complainants, when they received the right of easement, received it subject expressly to any condition named therein. The discipline can affect none but those who are parties to it by express agreement. Besides it can have no prospective bearing upon real estate—it would be a monstrous doctrine if it could.

The right of burial, and the sacredness of the grave, are not now to be the subjects of discussion. If there be anything in which the whole human family have in every age concurred, it is that the graves of the dead must be respected, and that their violation is an outrage against our best moral feelings. It is vain to talk about property, or the right of property. Such is our nature, and such the force of education, that the bare proposition to violate the sanctity of the dead, excites painful emotions. We, ourselves, in relation to our own dead, can not consent to it—can not suffer it, without feeling that we are criminal and barbarous. Shall we inquire into the nature and origin of those feelings? Do they not belong to, and grow out of the very structure of society? Are they not necessary to it? Do they not uphold a large portion of its moral refinement, and enter deeply into its best social relations? Were not these considerations operating on the mind of the Supreme Court, when they declared that the *dedication* of land to the object in question, was sufficient cause for a perpetual injunction against disturbers?

The case is placed distinctly on this footing, viz: that the ground has been used as a place of burial by the consent of those

who possessed and exercised acts of ownership over it, and that without objection. The persons, whose friends and relatives have been placed there under such consent, are before the court. Those who consented, are before the court. The title is entirely out of the question. The court will not suffer those who consented for an indefinite period of time, now to turn round and put a period to that consent. It is contrary to an express understanding; a subject in which society has a deep and sensible interest, which ought not to be so compromised. Any and every removal, without the concurrence of all who have friends deposited in the ground, is a violation to the full extent complained of

BROOKS, contra :

The ground assumed in the defense is :

1. That the complainants were not members of the Methodist Society, did not contribute anything toward the payment, and had no interest in the ground at the time of the purchase, in 1805.

2. That they could get no interest afterward, because the deeds were severally recorded, and expressed the particular trust to be for the purpose of erecting a meeting house, and *not* for a burying place. The deed being recorded was notice to the world; and no person could acquire any right under that title inconsistent with the trust expressed in the deeds, unless that right was acquired through and by the consent of the general conference. But, as the deed of 1805 was not recorded until October 17, 1807, by [522 which time Russell had become a member, it may be contended that the deed was notice as to him. But we answer this objection by the book of discipline, marked A, which contains the form of the deed of settlement (see page 201), which book was published in 1804; and as it was for the government of the members of the church, it was, of itself, notice of the use for which the society held real estate. Page 202 declares the same use the deeds declare, and makes all ground held by the church subject to the rules of the general conference. Hence this discipline is notice to a member of the church.

3. That no act of the trustees, or members in Cincinnati, could amount to a dedication of the trust property to any other uses than are expressed in the deeds.

As regards the first point of defense, it is sufficient to say that the answers contradict the bill, and there is no proof to sustain it.

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John Wood's deposition shows that James Russell was the only one of the complainants that was a member of the church in the fall of 1807; and he expressly says, that he does not think any others were members, or that they were here at that time. If not then residents of this country, is it probable they contributed to the payment, under an agreement to purchase?

The defendants maintain that the complainants, having no interest at the time of the purchase, could acquire none afterward which can entitle them to the prayer of the bill. It is true, most of the complainants have, at some time or other, since the purchase and before the filing of the bill, been members; but they all ceased to be members before the bill was filed. While members, they had only an interest in common with all the members of the association throughout the United States. They became members under the rules of the discipline, and were subject to these rules, and liable to be expelled for a breach of them; and whether in the character of members or seceders, or under a vote of expulsion, they could not sustain a bill to assert an individual interest in the common property.

In the case of *Denton v. Jackson*, 2 Johns. Ch. 330, 335, 337, 339, 523] it is decided that, "when a new town is erected *out of an old one, it loses its right to the use of the town property, which remains in the old town, though acquired at the common expense of the inhabitants before the division."

"Every person who has an interest, by virtue of being a member of a voluntary society, of a public nature, must be subject to the will of a majority of that society, and to the rules adopted by it." 1 Bos. & Pul. 229; 5 D. & E. 388; 4 Johns. Ch. 596.

It has been decided "that a parish may pull down pews to enlarge the church, and the minority of pew-holders have no remedy, unless it is done wantonly." 1 Pick. 91, 202.

In *Wentworth v. Parish in Canton*, 3 Pick. 344, the plaintiff claimed to recover for two pews he owned in the meeting house, which had been pulled down, together with the whole house, to erect a new meeting house. The defendant plead that the house and pews had been pulled down pursuant to a vote of the parish, etc. Chief Justice Parker says: "The property of a pew in a meeting house is a qualified property, subject to the right of a majority of the parish, to take down and destroy the house, if necessary for the purposes for which it was erected; that is, to

repair, enlarge, or re-build the same; and the minority of pew-holders would have no remedy."

In 15 Mass. 465, it is decided, "that the inhabitants of the town of Lebanon, as a congregational parish, have a right to the ministerial land, and the parson can recover it, though a large majority of the society had seceded and became Baptists."

In 7 Wheaton, 445, 468, it is decided, that "no new society, composed partly of the old parishioners, had any more right to dispose of pews than utter strangers"—p. 463.

Apply these authorities to the case at bar. A few disaffected members have seceded from the church and seek to control the majority; or, in other words, the whole body of the society, by asserting rights, which, if they ever existed, were acquired by virtue of their former membership. Admit the principle, that such a right may be sustained, contrary to the will of the majority, and all, of every denomination of Christians who had joined the society for the sake of "the loaves and the fishes," would immediately secede, and assert that right.

*By inspecting the deed of 1805 it will be found to have [524 been made in trust to "William Lyons, Robert Richardson, C. Smith, James Gibson, and James Kirby, trustees, for the purpose of erecting thereon a house of worship, for the use of the members of the Methodist Episcopal Church in the United States of America, according to the rules and discipline which, from time to time, may be agreed upon adopted, by the ministers and preachers of the said church, at their general conference in the United States of America," etc. This deed contains a covenant of warranty to the trustees and their successors, a majority of whom are now members of the church, and is sufficient to confirm to the church and its privies the perpetual and beneficial estate in the land. See 9 Cranch, 53. And this, whether the church was incorporated or not. This deed was recorded before any interments were made in the ground, and was, therefore, notice to all the world. 3 Swift's Dig. 118.

On October 17, 1807, another deed declaring the same use, and covering the premises named in the first deed and some more ground, was given, and was recorded October 22, 1807. At this time none of the complainants, save James Russell, were members. In June, 1821, the society having become incorporated for the purpose of saving the trouble of new conveyances as the trustees died,

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by vesting the title in the trustees incorporated, a new deed was procured, dated June 29, 1821, reciting the former deeds in substance, and expressing the same trust as in the first deed. At this time most of the complainants were members of the church, as appears by John Wood's deposition. All the pretended right set up by the complainants is derived from these titles, hence, they having been recorded, the principle applies, "that all persons coming into possession of trust property, with notice of the trust, shall be considered as trustees, notwithstanding they have paid a consideration. 2 Mad. Ch. 125; 1 Peters, 309; 1 Sch. & Lef. 262; and in Swift's Digest it is said, "if a trustee of real estate sell it after the deed is on record, and the trust is expressed in the deed, it is notice to the world; and the purchaser would take it subject to the trust." 2 Swift's Dig. 118.

525] *If the court recognize these principles, it seems to me they are decisive of the case; for surely the complainants can not have a better right, by virtue of paying for the privilege of interment in the ground, than an absolute purchaser with notice, who had paid a full consideration. At the time this last deed was given, the trustees had become responsible to Langrel and Williams in the sum of two thousand eight hundred and forty-six dollars and twenty-four cents, for building a meeting house, school house, and parsonage house, as will be seen by the book marked "minutes," which is made evidence by a notice from the complainants to produce it. Minutes of the Trustees, 26. To meet this debt, a part of the ground covered by the second deed, and not included in the last deed, had been directed to be sold, and was sold for twenty-eight hundred dollars, to Langrel and Williams. This sale, it will be seen, the trustees had a right to make, by the discipline and the very terms of the first and second deeds from Kirby. The deed of 1821 also declared, in addition to the former trusts, that the trustees should *maintain* on said ground a house of worship. Not a word is said, in any of the deeds, about a burying ground; but the trust declared, is expressly for the use of the living, not the dead. Not a murmur is heard from any quarter that a burying ground is not provided for. Not a syllable is found in the book of discipline upon the subject of a burying ground. All these facts go to repel the charge in the bill, that the ground was purchased for a burying ground. The answers contradict it; the circumstances contradict it. From the whole of the facts, the truth of the matter will be

found to be, that when the ground was purchased there was not a dozen members of the church in Cincinnati. The lot was considered almost out of town—the house necessary for worship small, and the lot large. No formal objection being made, members of the church, whose relatives died, buried them on the north line, adjoining Mr. Spencer's lot, as proved by Wood, under the supposition that the lot was large enough for that purpose, and for a meeting house. After 1813, others, then members, were permitted to be buried, the exact time is unknown, but probably after 1824 (see pages 25 and 52 of minutes), and *then, and not before, pay [526 was taken for the privilege. All this time it had not entered into the mind of man, that the little town of 1805 would so soon, as if by the power of enchantment, spread itself over the whole plain, upon which it then appeared as a mere speck.

But when the city by its rapid improvement had extended until this ground had become the center of population; when the dozen members of the church had increased to fifteen hundred; when several additions to the meeting house had proved insufficient to accommodate the congregation, the members began to talk of removing the dead, and enlarging the house. Not a word of objection is heard, though most of the complainants were then members. This talk continued two or three years, when the schism in the church took place. Then, and not till then, arose the clamor about disturbing the sanctuary of the dead; and that, too, from persons who had been expelled, or who had withdrawn to save expulsion. Then it was first discovered to be a disrespect to the memory of the dead, and an insult to the feelings of surviving friends, to talk of removing the remains to a more retired and appropriate place.

But let the argument be addressed to the reason, and not to the prejudice of man, and who can say there is anything improper—anything sacrilegious, or disrespectful to the memory of the dead decently to remove them? Is it not often done, as the highest mark of respect that can be paid to their memory? Where is the history, sacred or profane, that does not afford examples of this kind? The bones of Joseph were removed from Egypt to Palestine; the remains of Major Andre, from New York to England; Montgomery, from under the walls of Quebec; Lawrence and Ludlow's from Halifax, and Byron's from Greece; But to come nigher home; in a sister state they have recently erected their legislative hall on the very spot whence they removed the sleeping ashes of the pil-

grim fathers of New England. And, to come to our own city, the remains of the pioneers of this country, who first penetrated, where danger attended every step, the vast forest of the Ohio valley, have been removed to give place for a house of worship. A thousand such instances may be cited, but one other will suffice. The 527] *voice of this nation has decided the question, in soliciting the bones of the father of his country to be removed from Mount Vernon. Ye daring spirits! Ye illustrious dead, to whom, under heaven, we owe the enjoyment of the best country and government on earth, are ye ready to reprove the removal of your sleeping dust, or to approve the act? Are ye ready to say, let no mark of improvement or civilization be seen near where our ashes repose—let no temples to the God of armies be built at the expense of removing our remains? Or would ye say, we lived, we toiled, we fought, we bled, we died, for the benefit of posterity? Let our bones be decently removed. Let them enjoy the fruit of our toil.

The fact is, that the most wild, barbarous, and superstitious nations entertain stronger prejudice against removing the dead than the more civilized. It is said of the Scythians, that when their country was invaded by a victorious army, they would meet it on their own frontier, and if unable to repel the invader, would retreat from post to post, until driven back to the tombs of their ancestors, and there make their last and most desperate effort, until they fell upon the graves of their fathers, which they would die to defend.

But these prejudices have, I trust, been overcome by the march of civilization and the good sense of mankind. At least with the exception of the few Scythians who yet remain among us, and whose superstition may yet prevail.

The complainants seek a perpetual injunction, to prevent the removal of bones already crumbled into dust, from ground which has long since ceased to be used for interments—ground in the heart of a daily growing city; and that, too, to the exclusion of a meeting house, the very purpose of the grant.

The defendants contend that no injunction can lie where the defendant is in possession, or where the right is doubtful. 4 Johns. Ch. 21; 6 Johns. Ch. 50; 6 Ves. Jr. 51 787; Dukens, 599. In these authorities it is said, if the complainant in his bill state the defendants are in possession, they thereby state themselves out of court. An injunction is not allowed unless the plaintiff have a

vested title, legal or equitable. This bill states the defendants are in possession. The complainants show no legal or equitable title. *They have no property in the ashes of those buried there. [528
 "The heir may have a property in the monuments of his ancestors, but can bring no civil action against those who disturb their remains, when dead and buried." But the complainants do not claim in character of heirs, executors, or administrators, the only way in which they could have any semblance of legal or equitable right.

It will be seen, by Mr. Gest's plat and deposition, that there is not room enough to build a house, sufficiently large for the congregation, without disturbing the graves; and that Mr. Wood is mistaken in supposing the church owned more ground than they do, where he says that if the parsonage house and other buildings were torn down a house could be built of certain size, by which he makes seventy-five feet on Broadway to belong to the church whereas it is less than fifty feet. See Gest's plat.

Having shown the complainants have no title, legal or equitable, to the land, but admitting, for the argument, that they have an easement (though they surely have not, for the reason that the permission was not of the owners), by having been permitted, after 1813, to bury there, what can equity require of the defendants now, more than they have offered, to wit: to remove, at the expense of the church, to their own ground, and to refund the money to those who paid for the privilege of interment. This has been done (see the deposition of S. Lewis, and the papers thereto attached); and even this they were not bound to do, by the authority in 3 Pick. 347, above cited: and the authority is conclusive as against those who were then members. And will it be contended that those who were not members acquire any better right than those who were? Would a member, who had paid for a pew, which had been torn down, to rebuild the church, by a vote of the majority, have less claim to remuneration than the person, not a member, who had paid for another pew in the same church? Surely not; and yet we have seen that the member, in that case, would have no remedy, but must submit to the will of the majority. Hence, it follows that the other must also submit.

3. It is contended that this ground was dedicated to the purpose of a burying ground. The dedication of property *must [529

be to the *public*, and not to a part of the public. "There can not be a partial dedication." 1 Camp. 263, note 6.

It appears, by the deposition of Wood, this ground has been inclosed and kept locked up from the public, and that no person could enter, even at the time interments were permitted, without an order from the trustees. The trustees have always controlled the ground; and this fact, of itself, repels the idea of a dedication.

Again: The dedication of land to public uses supposes an *act* to be done by the *owner* of the *fee*, a person having the right to make it, and that act must be *unequivocal*; and it is apprehended that a trustee of real estate can not make, by any act, however unequivocal, a dedication of land contrary to the trust expressed in the deed, and without the consent of his *cestui que trust*; and if a trustee were to attempt to make such a dedication the public would take it, subject to the trust, as a purchaser with notice would take it.

For whose use were these lots granted? I answer, for the use of the members of the Methodist Episcopal Church in the *United States*. Who had the power of controlling or consenting to a dedication? The general conference of the ministers and preachers of that society in the *United States*. Have they thus consented? No, it is not pretended.

When the society of Cincinnati became incorporated, it became, by the very terms of the deed, trustee in its corporate capacity for the society at large of the *United States*; and the power has never existed, short of the general conference, that could have dedicated this to a burying ground. See the act of incorporation of the Methodist Episcopal Church of 1827.

Again: I maintain that if the trustees in this case had been the absolute owners of the fee that the acts they have done are too equivocal, or rather, do not evidence an intention that would amount to a dedication.

It has been decided, in several cases, that if the owner of land throw open a road and let the public pass through, if he soon after put up a bar, though it be immediately thrown down, yet the erection of the bar is evidence that he did not intend to waive his right to control the way, and will prevent a dedication; and in a 530] late case, 5 Taunt. 137, Justice *Gibbs said: "If he had drawn a thread across it would have prevented a dedication." It will be found, by all the cases on this subject, that any act on the

part of the owner, even the slightest exercise of ownership, will prevent a dedication; or any disability to exercise such an act will prevent it.

In the case of *Wood v. Veal*, 5 Barn. & Ald. 454, which was trespass for breaking a yard, which had been opened as a street as far back as living memory could go; had been called a street by an act of parliament; and by virtue of that act had been paved, cleansed, and lighted by the public; watchmen had been stationed in it, and the plaintiff had known these facts, and lived by it for twenty-four years before he inclosed it; but the plaintiff repelled the presumption of a dedication, by proving that there had been a lease given, by the then owner, one hundred years before, for ninety-nine years, which had expired two years before he inclosed the ground. The chief justice charged the jury that they would consider whether there had been a dedication before the date of the lease or after it had expired, with the consent of the owner of the fee. The jury found for the plaintiff, and the chief justice said "they had found a right verdict;" and also said there could be no dedication except by the owner of the fee.

In the case of *Harper v. Charlesworth*, 1 Barn. & Cress. 674; 10 Serg. & Raw. 412, "A public foot-way, over crown land, was extinguished by an inclosure act; but for twenty years after the inclosure took place the public continued to use the way. It was held that this use was not evidence of a dedication to the public, as it did not appear to have been with the knowledge of the crown." Hence it appears to be well settled that an act of dedication must be proved, or that the owner had notice of the use.

There is a case of dedication in 4 Campbell, where the use had been for fifty years and notice proved.

In the case of *Pickering v. Noyes*, 16 Serg. & Raw. 429, decided in 1825, there had been a use of the ground for seventy-two years, and no evidence of any interruption for the first fifty-eight years of that time. There was a notice by the owner not to trespass; but the use was continued fourteen years more, when the owner brought trespass, and the action was sustained. The jury would not *presume a grant from the lapse of time without proof [531 of notice and acquiescence.

If it be contended by complainants' counsel that here was a grant of private right, I answer, that neither the trustees, nor even the members in Cincinnati, had any right which they could

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grant; "for trusts and confidences are personal things, and may not be granted over to others in most cases." 3 Jacob L. D. 196.

If the complainants claim a private right they must allege it specifically in the bill. They have not alleged *who* paid for interments, and the particular interment paid for. Surely the court can not enjoin those who buried in the ground, intending to remove, and who wish to do so. It is not true that any of the present members of the church object to removing. Not one of the complainants is now a member. On the contrary, the members wish to remove their dead from this ground.

This is not like the case of *Beatty v. Richey*, 2 Peters 566, relied on by the complainants. There was a grant by Beatty; but it was contended it was void for want of a grantor. Beatty had acquiesced for thirty-five years, and until his death, and his son had admitted, for fourteen years more, that the ground belonged to the German Lutheran Church of Georgetown. The court held, that though the case must be decided on other principles than ordinarily apply between grantor and grantee, that the Lutherans had a right, by virtue of the bill of rights of Maryland, etc. (See p. 583.) It will be found that the whole case turned on that point connected with the fact of the recorded plat.

In the case in 9 Cranch, also relied on, there was no question whether there was a grant or not; but the whole question there was, which of the two grants was the best title.

It is contended by Messrs. Storer and Fox that the trustees had violated their trust, by selling the hundred feet square; but it will be seen by the deed that where the trustees were responsible for money, they were authorized to sell by the very terms of the deed. The book of minutes, page 26, shows that they were indebted to Langrel and Williams, two thousand eight hundred and forty-six 532] dollars and twenty-four *cents, being more than the proceeds of the sale forty-six dollars and twenty-four cents; and this debt was created strictly within the powers they held as trustees under the deed; and the discipline (see section 15), providing for the instruction of children (see also part 2 of the discipline, section 2), provides for the building of churches, houses, etc., and the management of schools. This debt was contracted in building houses necessary for the society, to wit: a school-house, preacher's house, etc. Page 15, of the book of minutes, shows that the school-house was to be used for other church purposes, as well as

a school. And these buildings were not erected for *profit*, as alleged by complainants' counsel. They also contend that the trust has been violated for twenty-five years. Here they are under a mistake. It was no violation of the trust to permit interments while there was yet ground enough for a church sufficiently large for the society. It will be seen by Wood's deposition that the interments were confined, in 1817, to the northern line of the ground. Those interments, and all others, have been made subject to the erection of a house sufficiently large, and it is manifest that such a house can not now be built without disturbing some of the graves at least. Surely it can not be that a court of equity will (even admitting it an oversight in the trustees to permit interments, and admitting they intended at the time to leave them undisturbed), decree a perpetual injunction, and thus defeat the trust expressed in the deed. A trustee can not bind his *cestui que trust* by any contract which would defeat his trust, as an agent might his principal; and particularly where there is notice of the trust. Can the court decree that those who wish shall not remove their dead? And if not, how will the court discover, from the bill, to which graves the prohibition shall apply? The statute of 1819, cited by complainants' counsel, is against rather than for them. That requires that the ground should be for the sole purpose of a burial ground. It must be platted, *and carefully noting its extent and situation, and be recorded*—and if so done, it shall never be used for any other purpose. Now, what is the inference, if it is not so done? Why, that the party did not intend to bind himself by thus appropriating the ground. That not being platted, recorded, *etc., it may be used for other purposes. This statute was [533 to answer the same purpose as a dedication to pious uses in England; and it has pointed out *what shall be proof of such dedication*, to wit: *survey, plat, carefully noting its extent and situation*, etc., and lastly, *recording*, none of which has been done, further than to say what had been before a promiscuous mode of interment, should be reduced to order, by burying in ranges. Again, these ranges were laid out in 1813. The statute was passed February 5, 1819. It can not have a retrospective effect, for if the church had a right to disturb the graves after 1813, and before the statute was passed, it has still that right, the statute to the contrary notwithstanding. *Dash v. Van Kleeck*, 7 Johns. 477.

STOREE and FOX, in reply :

The question arising, under all the circumstances attending this cause, is, can the defendants be enjoined and restrained from violating the sepulchres of the dead, and the feelings and sentiments of the complainants and others, whose relatives have been deposited, under the understanding implied in all such transactions, that the bodies of the dead shall remain unmolested ?

Before we discuss the main question in controversy, a preliminary one appears necessary to be disposed of.

It is alleged in the answers, and insisted upon in argument, that the court ought not to interfere in the matter, because it would be compelling the defendants to violate their trust, under which the title is held. It is alleged that the deeds only convey the lots to be held for particular purposes ; and that, therefore, although the defendants have already violated their trust, by appropriating the property to uses opposed and foreign to the purposes of the trust, yet the court, by decreeing that the trustees, as between themselves and the present complainants, shall perform their contracts, made with the complainants, according to the fair and honest interpretation of that contract, are compelling the defendants to violate their first contract.

To show that this argument can not avail, let us see what it leads to, if carried to the extent contended for. It is admitted, 534] *for instance, that the trustees have made a valid and binding contract, which ought, in equity and good conscience, to be performed and kept. Does not the court, by refusing to enforce that contract, enable the trustees and defendants to *violate* that contract ? They certainly do ; and, therefore, according to this mode of argument, the court ought not to refuse to decree according to the prayer of the bill.

But it is only necessary for us to refer to the history of these proceedings, to show, that by decreeing in favor of the complainants, the court are not compelling the trustees to violate their trust. That trust has been violated for twenty-five years past, according to their own argument ; and the person who made that deed has been knowing to this violation of the trust, and has acquiesced in it. The answer of the defendant, the Methodist Episcopal Church, shows, that as late as 1821, James Kirby again deeded this same property to the trustees of the church ; and the deed itself shows that the object was to confirm the title. And further, it appears

the trustees had violated their trust, so far as to sell one hundred feet square of this lot; and he expressly affirms even that breach of trust, and states he has, by the request of the trustees, conveyed said one hundred feet to Langrel. Surely, then, the men who have violated the trust are the last men who should be heard to proclaim that violation in a court of justice, and that, too, for the purpose of violating another trust, more sacred than the first one.

But we deny that the trustees did commit a violation of the trust, in appropriating a part of the lot for a burying ground, so long as they kept a church on the premises, for the worship in the religion mentioned in the deed.

By referring to Mr. Wood's deposition, it will be seen, that if the other houses which they have erected (for the purposes of profit or convenience) on the lot, were removed, they could build a house large enough, in all conscience, for all the religious sects in Cincinnati. If the defendants are anxious to avoid committing, or continuing to commit, a breach of trust, it would be well for them to take down their buildings; and the employment would be more agreeable to all persons having correct feelings upon such subjects.

*But let this be as it may, it is the *cestui que trust* only who [535] can complain of a breach of the trust. It is he, and no other person, who can come into a court of equity to enforce the trust. But it is certainly against the moral policy of the law to permit a trustee, who has committed a breach of trust, to come into court and avoid a contract solemnly made, on the ground that he made it fraudently. The relief sought can not be denied, then, upon the simple ground that the appropriating the lot for a burial ground was and is a violation of the trust.

The complainants, then, contend that inasmuch as the trustees of the Methodist Church have appropriated this spot for a burial ground, dedicated it for that use, and received a compensation for every six feet of ground used for the purpose of interment, it is out of their power to make use of the ground for any other purpose than the one for which it is so set apart.

The religious sentiments and feelings of the community are to have some weight with courts of justice in the decision of causes which may arise. And although some persons may think it a matter of perfect indifference as to the mode and manner in which the body is disposed of after life has become extinct, yet the great

mass of mankind think very differently. The idea of the body being mangled by dissection, or otherwise, after death, is beyond description shocking to the most of us. Hence, we see, in the neighborhood of medical colleges, the people burying their dead friends in their cellars and gardens; or, if they trust them to the public graveyard, they set a watch over them until their putrefaction becomes sufficient protection to them.

That all persons feel a sentiment of affection and esteem for their friends and relatives is further evidenced by the monuments erected to keep them in remembrance. In most countries, so strong is the sentiment, and so universally felt by the whole community, that laws, the most severe, have been enacted to punish those who attempt to disturb the repose of the dead.

Our own legislature have not been unmindful of the sentiments of the people on this particular subject. They have not only declared it highly penal to dig up, or remove, or to assist in digging up or removing dead bodies; but have extended the offense to persons who "should break down or destroy any monument, or tombstone, erected, or set up, to perpetuate the memory of any deceased person."

We claim, therefore, that this spot of ground has been dedicated for public purposes, and that it can not be used for any other.

In all cases of dedication, no grantee is necessary. "In the familiar case, where a man lays out a public street or highway, there is, strictly speaking, no grantee of the easement, but it takes effect by way of grant or dedication to public uses." 9 Cranch, 331.

In *McConnel v. Town of Lexington*, 12 Wheat. 585, 586, the court sustained a dedication of a spring for public use, although there was no written evidence of the dedication. The opinion of the court was founded on the reasonableness "of reserving a spring for public uses; the concurrent opinion of all the settlers that it was so reserved, and the universal admission by all that it was never understood that the spring lot was drawn by any person."

So in *Beatty and Ritchie v. Kurty and others*, 2 Pet. 566, the court held that the proprietors of the town of Georgetown, in setting apart a lot, or portion of ground, for the sole use and benefit of the German Lutheran Church, so dedicated the lot to public and pious uses; as to prevent the original owner from again asserting any claim thereto.

And the learned and eloquent Judge Story, in delivering the

opinion of the court, shows clearly, that after a spot of ground has been appropriated for a place of burial, it can never afterward be used for any other purpose. Speaking of the lot given to the German Lutheran Church, he says: "It was consecrated for a religious purpose—it has become a depository of the dead; and it can not now be resumed by the heirs of Charles Beatty."

It is said, however, that no dedication of this lot, for a burying ground, has ever been made, because the church, or society, or trustees, have always retained a control over it, and have so acted as to show that a dedication for the purposes of a burial place never was contemplated.

It might be asked, then, for what purpose was the lot laid off into ranges, in 1813? Why did the society reserve the [537 twelve eastern ranges, for the interment of members of said church, and the western ranges for the interment of strangers, as is sworn to in the answer of defendants? If this was not dedicating, or setting it apart for the purpose of a burial ground, what act, or conduct, on the part of the church, or society, would be sufficient to show a dedication for the purpose?

If selling out graves is not an evidence of the intention to reserve the ground for a burial ground, it was evidence of an intention, on the part of the society, to cheat strangers out of their money. But their intention was fair at the time—they had no intention to cheat any person—they could have no such intention, for their own relatives and friends were also deposited in this common sepulchre.

It does appear, therefore, to us that it is useless to endeavor to persuade the court that the trustees and the society did not dedicate or appropriate this ground as a common burial place.

"No particular time is necessary for evidence of a dedication—it is not like a grant, presumed from length of time. If the act of dedication be unequivocal, it may take place immediately." 5 Taunt. 137.

We do not contend that it was dedicated to all persons; it is not necessary that all persons should have free access to the burial of their friends, in order to show a dedication. The case in 2 Peters could not be supported on the principle of a dedication, if that were necessary; for the lot in that particular case was reserved "for the Lutheran Church." Other denominations of Christians could claim no interest in this reservation, and yet the court rest

their decision on the simple principle that the reservation was "*a dedication of the lot to pious uses.*"

But we are not driven to rely upon any general principles of law, or upon any particular adjudications of courts, to show that when a spot of land has been set apart for a burial ground, it can not afterward be used for any other purpose. Our own legislative provisions are sufficient to secure the repose of the dead, and the best feelings of their surviving friends from being wounded by an improper removal.

By section 4 of the act of February 5, 1819, vol. xviii., reprinted 538] *page 8, entitled "an act for the incorporation of religious societies," provides, "that any lot or piece of land obtained by any religious society, by purchase or donation, and set apart for the sole purpose of a burial ground, may be by them surveyed and platted, carefully noting its extent and situation, and be recorded by the recorder of the county in which the same is situated; which lot or burying ground, *if it be occupied as such at the time of recording, shall never afterward be sold, transferred, conveyed, or used for any other purposes whatever.*"

The defendants, R. Richardson, B. Stewart, Christopher Smith, and O. M. Spencer, part of the trustees, in their answer, admit that the "first particular act on the part of the church, of which these defendants have any knowledge or recollection, relative to interments in said ground, was in the month of March, 1813, at which time these defendants admit that the then trustees of the church adopted a plan by which about one hundred feet square, in the northwest corner of said ground, a part of which was then filled with graves, was laid out in fifteen ranges, running north and south, etc.;" and the resolution on the first page of the minute book forwarded shows the adoption of the plan.

Here, then, is an admission of all that is necessary, as we conceive, to secure the prayer of the complainants. The statute has left no room for doubts upon the subject. The defendants admit they laid off the ground into lots for burial, and that the ground has been so used ever since, until very recently. The statute says the ground so used shall *never* be sold or used for any other purposes whatever."

Surely it will not be pretended that because the trustees neglected their duty in not placing their plat on record, their

obligation to keep the ground for the purposes of burial, is less sacred.

But it is contended that, notwithstanding all this, the defendants may, if they think proper, remove the dead, and there can be no relief in this way, nor in any other mode known to the law. No language, in answer to this suggestion, could be more pertinent or appropriate than a few beautiful sentences of Judge Story, in the opinion delivered in the case of the Lutheran Church above referred to, *2 Peters, 584. He remarks: "It is a case [539 where no action at law, even if one could be brought by the voluntary society (which it would be difficult to maintain), would afford an *adequate* and complete remedy. This is not the case of a mere private trespass; but a public nuisance, going to the irreparable injury of the Georgetown congregation of Lutherans. The property consecrated to their use by a perpetual servitude or easement is to be taken from them; the sepulchres of the dead are to be violated; the feelings of religion, and the sentiment of natural affection of the kindred and friends of the deceased, are to be wounded; and the memorials erected by piety or love to the memory of the good, are to be removed, so as to leave no trace of the last home of their ancestry to those who may visit the spot in future generations. It can not be that such acts are to be redressed by the ordinary process of law. The remedy must be sought, if at all, in the protecting power of a court of chancery; operating by its injunctions to preserve the *repose of the ashes of the dead, and the religious sensibilities of the living.*"

Opinion of the court, by Judge WRIGHT:

The complainants rest their claim in argument upon the following grounds:

1. That as purchasers of the privilege of burying in the yard, they thereby acquired a right to the exclusive use, each of a portion of the soil.

2. That this ground has been dedicated to public and pious uses, as a burying yard, and that the disturbing the repose of the dead is a public nuisance, shocking to the best moral and religious feelings of community, which can not be remedied by ordinary legal process.

As to the first point. We are unable to perceive how the complainants could acquire any right to the soil, by the payment of

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the burying fees. That exaction, it does not appear, was ever made or yielded to, under any agreement, understanding, or expectation, on either side, that it was the purchase of any portion of the land. No conversation looking to that end ever passed between the parties, nor was any memorandum, conveyance, deed, 540] or other instrument of *writing, of any sale, purchase, or appropriation of any portion of this ground, ever demanded or given by the parties. The probability is, these exactions were only made to defray the expense of keeping the ground inclosed and in repair; possibly for compensation to a sexton. But it is unnecessary to inquire into this matter further. At no period of time, since the first organization of government in the territory, now forming the State of Ohio, could title to real estate be acquired in the way claimed. The trustees of the church held this land as *trustees* only. The limit and extent of the trust was fully and clearly expressed in the deeds, which were formed according to the printed discipline of the society, in the possession of all the churches of the Methodist persuasion.

The deeds were recorded in the county. The discipline and record were notice alike to the members of the church, to those dealing with it, and to all the world, of the manner in which the trustees held these lots, and of the extent of their power over them. They had no right to use them for other purposes than those expressed in the deed; and if they undertook, expressly in terms, to sell and convey any part of the lots, in any other manner, or for any other purpose than is expressed in the conveyance, their acts would be void.

Can it be successfully maintained that persons trading with trustees or others, standing only in fiduciary relation to the subject of the trade, can acquire any more or greater rights than the trustees have powers to grant? We think not. The payment of money for interment is no uncommon thing, but has never been understood as the purchase of a right. It is a charge upon the estate of the deceased, and stands in place of an original contribution for the purchase of the ground, for repairs, and for protecting the ground. Comyn's Dig., Cemetery, A. 3, B. 324, 326.

If the claim of the complainants be placed on the ground of membership and contribution to the purchase of the lots, it will not be found much more favorable. Property of this kind, acquired by the common contribution of the members of an associ-

ation, is subject to their common control. No separate interest is acquired; and such property is managed by the majority. Even a vote to divide, gives to individuals *no right to enforce [541] any separate interest. *Denton v. Jackson*, 2 Johns. Ch. 320-329.

The interest of the members of the Methodist Episcopal Church assimilates very near to that of pew-holders in a church. The right to pews is limited and usufructuary, and does not interfere with the right of the parish to pull down and rebuild the church. *Freligh v. Pratt*, 5 Cowen, 496. Even an individual, not a member of the society, who purchased and paid for a pew, and occupied it thirty years, acquires but a qualified property in it, subject to the common control; and if it be determined to pull down the church, the minority of pew-holders have no remedy, unless it is done wantonly. *Gray v. Baker*, 1 Mass. 435; *Daniel v. Wood*, 1 Pick. 102; *Wentworth v. Parish in Canton*, 3 Pick. 344; *Commonwealth v. St. Mary's Church*, 6 Serg. & Raw. 508; *Mason v. Muncaster*, 9 Wheat. 445; *Terret v. Taylor*, 9 Cranch, 52; *Green v. Willer*, 6 Johns. 41. See also 4 Johns. Ch. 596, and 6 D. & E. 396.

Upon the best reflection we have been able to bestow upon this branch of the question, we are brought to the conclusion that the complainants have failed to establish their right to the interference of this court by injunction.

As to the second point. It is urged that the property has been dedicated to the public as a burying ground, under the act of the general assembly of Ohio, February 5, 1819, 17 Ohio Laws, 120, for incorporating religious societies. Section 4 of that act provides: "That any lot or part of lot, obtained by any religious society, by purchase or donation, and *set apart for the sole purpose of a burial ground*, may be by them surveyed and platted, carefully noting its extent and situation, and be recorded by the recorder of the county in which the same is situated, which lot or burying ground, *if it be occupied as such, at the time of recording*, shall never afterward be *sold, transferred or used for any other purposes*." The complainants contend that the platting the fifteen ranges of burying blocks and the resolution adopting the plan brings this case within the statute of Ohio. We will examine this claim, as it regards the one hundred feet platted into burying blocks, and if it shall be found that the *statute does not embrace that portion [542] of the lots, it will hardly be contended it does the residue. Was the one hundred feet *set apart for the sole purpose of a burying*

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ground? Was it platted and recorded? At the time it was recorded was it *used* as a burying ground? The lot was purchased for a meeting house or church; certain persons, members and others, were permitted to bury their deceased friends there. The conveyances not only give no authority for such burials, but contain express limitations of the trust to other uses that may be inconsistent with the use claimed. There is no evidence that the lot was ever, in fact, set apart for the sole use of a burying ground, or intended to be so set apart. It has never been recorded as a burying ground. By the *minute* of the society referred to, it appears that a plan of the blocks was exhibited containing fifteen ranges, which plan was approved; that the ranges and blocks were ordered to be designated at each end by stakes, etc.; that the plat should be deposited with one C. Smith, who should designate future interments.

The evidence does not show that the ground was ever finally surveyed and platted, or that the ranges and blocks were marked and designated by stakes, or otherwise, or their extent and situation arefully noted. There was no order for the record nor any record ever made. There is no order setting apart this ground for the *sole purpose* of a burying ground. The plan of the fifteen ranges may have been a rough sketch only, upon which the meeting may have intended to take further steps under the law; but we have no evidence that they did do anything more. The provisions of this act innovate upon the settled general law of acquiring title to real estate, and its provisions must be substantially followed, or no rights can be gained under it.

The transfer of real estate to the public or to individuals, under the operation of law, without grantee or deed, can only be sustained where a clear case is presented, leaving no doubt of such legal operation. The requisitions of the statute are not satisfied by the acts of the trustees or society in the case before the court. The substantial provisions of the act have not been followed. But it is said that the trustees here shall not avail themselves of 543] their own neglect to cause *their plat to be recorded to avoid the dedication claimed by the complainants. It is a sufficient answer to this assumption, to say that the law referred to, has not been complied with, in its other requirements. It will be time enough to decide that question when a case shall be presented where the substantial provisions of the act have been all complied with, and

there appears only a neglect to place the plat on record. There is strong reason for supposing, however, that the placing the plat on record, and thus giving it publicity, is essential to the passing title to real estate under its provisions.

The counsel for the complainants urge, with great earnestness, that the acts of the defendants amount to a dedication of this lot, to public and pious uses, which is to be sustained upon general principles; and several adjudged cases are referred to as settling this claim beyond dispute. The case of *Woodyard v. Haddon*, 5 Taunton, 125, is cited. In that case, the plaintiff had erected and opened a street, leading from a public highway across his own lands, and terminating at the defendant's close. This had been used for twenty-one years, and had been paved and lighted at the public and private expense. It was claimed that this was a dedication to *public use*; but Chief Justice Mansfield was of a different opinion, and the jury found that the land had not been dedicated to the public. On a motion for a new trial the case was fully argued, and Judges Mansfield, Gibbs, and Heath decided that the land was not dedicated to the public, while Judge Chambre was of a contrary opinion. The opinion of Chambre is cited to us as the law of the case.

The *Town of Pawlet v. Clark et al.*, 9 Cranch, 292, is relied on. In that case there was a grant, by the crown, to sixty-three persons, of twenty-three thousand and forty acres of land, in the town of Pawlet, six miles square. The tract was divided into sixty-eight shares, four of which were reserved—one for a glebe of the Church of England. The court determined that the Church of England was not a body capable of receiving the grant *eo nomine*; that a grant at common law may be made to pious uses before a grantee is in existence, capable of taking; and if made by the crown, it could not be resumed at the pleasure of the crown. That the State of Vermont, which, after the revolution, succeeded to *the [544] rights of the crown in the glebe, might alien the land, with the assent of the town; or might erect there an Episcopal church, and collate its parson, who would thereby become seized of the glebe, *jure ecclesiæ*, and become a corporation capable of transmitting the inheritance. We do not perceive the bearing this decision has on the case before the court. The legal dedication of land to the public use, without an individual grantee, we shall have no occasion to dispute.

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In the case of *McConnel v. Town of Lexington*, 12 Wheat. 585 586, the court sustained the dedication of a spring for public use, without an individual grantee or written evidence, upon the reasonableness of the dedication. The lots in that town had been disposed of by lottery draft, and the court predicated their decision upon the concurrent testimony of all the settlers, that the spring was so reserved, and the universal opinion that *no person* had drawn the spring lot.

The case of *Beatty and Ritchie v. Kurtz et al.*, 2 Pet. 566, is most earnestly pressed upon our consideration as conclusive authority in the case at bar. In that case, Beatty and Hawkins, in 1769, laid out an addition to the town of Georgetown, the lots of which addition were laid down on a map, on which was set apart a lot for the sole use of the German Lutheran Church, as their absolute right and property, to be held by them for *religious purposes and the use of the congregation*. This plat was duly recorded, according to the laws of Maryland. Shortly afterward the Lutheran society took possession of the lot, inclosed it, built a church on it, and opened a burying ground. They had from thence continued to hold it upward of fifty years, and used it as a burying ground, without their title being called in question.

They were put in possession by Beatty, who declared the lot to be *the property* of the Lutherans, and that he was ready to convey the title; and both he and Hawkins died without claiming or disposing of said property. Ritchie, the heir, entered upon the lot and tore down the fences and tombstones, and was about breaking open the graves and removing the remains of the dead. The Lutherans filed their bill to compel a conveyance of the lot in fee, to be quieted in their possession and use, and for an injunction upon the defendant[s] ⁵⁴⁵ from interrupting or disturbing it. The court sustained the bill, on the ground that there was a dedication of the lot to public and pious uses. In this decision they make express reference to the laws and bill of rights in the constitution of Maryland, which gave validity "to any sale, gift, lease, or devise of any quantity of land not exceeding two acres, for a church, meeting, or other house of worship, and for a burying ground, which shall be improved, enjoyed, and used *only for such purpose*;" and also to the laws of Maryland, for laying out and recording town plats, which contains similar provisions to the law of Ohio, on the same subject. The court determined that in such cases of dedica-

tion it was not requisite there should be a legal grantee at the time of the dedication. That was a case of *dedication* by the ancestors of the defendants, at an early period, without grant, by *designation* on the original plat of the town, and the record thereof under the laws of Maryland.

The Lutheran society were put in possession by the proprietors, and had quietly occupied for more than half a century, without interruption from them, and accompanied by their repeated declarations of the rights of the Lutheran society. After all which, the heirs of the proprietors were attempting to reclaim the possession of the lot, and to appropriate it to their own private use, on the ground that the title had never passed out of their ancestors. The court very properly determined, that in such case an individual grantee was not necessary to an effectual dedication of the lot at law. Were a similar dedication made by the proprietors of a town in Ohio, under our statute, by designation on the plat of the town, and a record made according to the provisions of the act for incorporating religious societies, referred to by counsel, we should without difficulty find an analogy of principle, sustain the dedication, and exercise the same power to restrain undue interference with the public or church rights, acquired under the dedication. And in the present case, if Kirby, the grantor, or his heirs, were seeking to reclaim these lots, as forfeited by the burials which have been made in this yard, we should not hesitate to restrain them.

The learned and eloquent Judge Story, in closing the opinion of the court, in the case last referred to, remarks: **"This is not* [546 *a case of a mere private trespass; but a public nuisance, going to the irreparable injury of the Georgetown congregation of Lutherans. The property consecrated to their use, by a perpetual servitude or easement, is to be taken from them; the sepulchres of the dead are to be violated; the feelings of religion, and the sentiments of natural affection of the kindred and friends of the deceased, are to be wounded; and the memorials, erected by piety and love to the memory of the good, are to be removed, so as to leave no trace of the last home of their ancestry, to those who may visit the spot in future generations. It can not be that such acts are to be redressed by the ordinary process of law. The remedy must be sought, if at all, in the protecting power of a court of chancery, operating by its injunction to preserve the repose of*

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the ashes of the dead, and the religious sensibilities of the living." With these sentiments and feelings we fully accord, and where a case is presented analogous in principle, shall be ready to apply the proper remedy. But the case in hearing bears no analogy to the Lutheran case. It is governed by certain fixed principles of law, over which this court can exert no control.

By a recurrence to the title papers, a part of this case, all must clearly perceive the nature and extent of the grant made by Kirby and wife to the trustees of the Methodist Episcopal Church. The object and limit of the estate granted in trust, is in the deed defined and distinctly marked out. The trustees "shall erect and build, or cause to be erected and built, a house or place of worship, for the use of the Methodist Episcopal Church of the United States," according to the rules and discipline of said church, at its general conference, and to maintain the same forever, permitting the preachers and ministers, authorized by the general or yearly conference of said church, to expound God's holy word therein, and none others. Nothing is said in either of these deeds or dedications of trust on the subject of *any other use whatever*. In the Lutheran case, the dedication was to the *use and benefit of the Lutheran Church, to be their absolute right and property, and held for religious purposes and the use of the congregation*. In Kirby's declaration of trust, the *erecting and maintaining a place of worship* for the members of the Methodist Episcopal Church, according to 547] the rules and discipline of **their conference or government, is the main, if not the only object of the grant*. There is no ambiguity in the terms of the grant, or room for any latitude of construction. No other use or purpose is expressed. Can a court of chancery change a trust expressly declared by the grantor in trust? It may enforce the trust, and compel the execution of its provisions, according to the design and purpose of the grantor, but can it divert the trust, and so construe it as to defeat and thwart the object and purpose of its creator? We think not. The trustees of the Methodist Episcopal Church take these lots under Kirby's deeds in fee, as trustees of an expressed trust, limited and declared on their face. There is nothing left to implication or inference. It is an admitted principle, not only that the rules of property should be the same in equity as at law, but that the rules of construction should be so likewise.

Courts of equity, therefore, when trusts are actually and finally

limited, generally follow the rules of the courts of law. Jeremy's Eq. Jur. 30; 2 Burr. 1108; 14 Viner's Ab., title Intent; 2 Ves. Jr. 655, and 1 Jacob & Walker, 571. If this be correct, and we believe it is, let us inquire whether *at law* we could extend this trust, so as to cover individual or public rights, resulting from *use* and *occupation*, not only beyond the trust expressed in the deed, but inevitably tending to the destruction of the trust itself. It will not be seriously contended, that a court of law could do this. If, then, the rule of property and construction is the same in this court as in a court of law, there would seem to be an end of the inquiry. The trust expressed in the conveyances must govern; and unless we can find some general expression in the trust, embracing the claims set up by the complainants, we can afford them no aid or relief. We have looked in vain for any such claim or expression. Injunctions are not allowed where the complainant's right is doubtful, nor unless he show a vested title, legal or equitable, or such a public interest which any one may ask to have protected. *Corporation of New York v. Mapes*, 6 Johns. Ch. 50; *Storm v. Mann*, 4 Johns. Ch. 21. The complainants in this cause have shown no such interest or right.

The express trust declared by Kirby, being to secure, forever, a church or place of worship for the members of the *Meth- [548
odist Episcopal Society, we conceive it to be within the legal and equitable construction of the trust, to allow the trustees, as the society increases in numbers, and its exigencies require, to enter upon the lots granted, in order to erect a new and larger edifice than the one originally erected. The kind of building adapted to the convenience of the society, and the part of the lot on which it shall be built, are matters necessarily and legally left to the sound discretion of the trustees, aided by the advice of the congregation. They must be taken to act in good faith, until the contrary be alleged and proven. We can never *presume* their acts wanton, in the absence of all evidence. No such inference can be drawn from the vote of the society, and the resolution of the trustees, to build a new church. We should incline to restrain them from any wanton breaking up of the graves in this yard, though we see no necessity for deciding this question now.

From the view taken of this case, it results that the trustees have a legal and equitable right, under Kirby's deed of trust, to determine, in good faith, the necessity of erecting a new church or place of worship, its dimensions and site, having regard to the

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convenient enjoyment, by the society, of the lots, for the purpose of the grant; that, in order to execute the trust fairly, they may so far interfere with the interments made on the lots as may be necessary to lay the foundations of the new church; and in executing their work, they may disinter, and decently remove the remains of any dead within such limits—forbearing any act calculated to shock the feelings of surviving friends or the public.

We do not intend to express any opinion, encouraging the idea that the trustees of the Methodist Church can appropriate this ground to any other purpose than the erection and maintenance of a suitable and convenient church for the society, upon the plan agreed upon by the society, or the trustees; nor further interfere with, or disturb the remains of the dead, buried there, than is necessary to effect that object.

The bill is dismissed, and the injunction dissolved. Each party to pay their own costs.

N. B. Judge COLLET, who allowed the provisional injunction in the above cause, was present when the decision was made, and concurred with the court in the principles decided.

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2. In a civil action for nuisance, before a justice of the peace, judgment is given for plaintiff, defendant appeals, and docket the appeal. Plaintiff declares, and plea to the merits is filed. Defendant may afterward move to quash proceedings, for original defect of jurisdiction, 202, 203.

JURORS—

- Juror may be challenged for cause, although the challenger has not exhausted his peremptory challenges, 350.

LANDS—

1. Lands of a non-resident decedent can not be subjected to his debts, in equity, without the appointment of administrators, 70.
2. Lands acquired after judgment and aliened before levy, are not subject to the lien, 92.
3. A devise of land, made in 1811, when the deviser held by verbal contract, which was subsequently consummated into title, held valid, 121.
4. Sale of decedents lands, by executor or administrator, is not sustainable, unless the record contain an order of court directing such sale, 129.
5. Resolution warrants good to appropriate lands between Scioto and Little Miami rivers, 233.

LETTER OF CREDIT—

- A general letter of credit creates no obligation in favor of persons to whom such letter was never shown, 197.

LIEN—

1. The lien of a judgment does not attach to after-acquired lands aliened before levied upon, 92.
2. Judgment lien on land not discharged against subsequent purchaser, in consequence of a previous levy on chattels released by consent of parties, 383.

LIMITATIONS, STATUTE OF—

1. The running of the statute of limitation is interrupted by the parties submitting a question of boundary to arbitration, 310.
2. Statute of limitations begins to run, when the injurious act complained of is committed, though the injury is subsequent and consequential, 332.

MANDAMUS—

- It is a sufficient return to a mandamus to sign a bill of exceptions, that the facts are not truly set forth, 351.

Merchants—Nuisance.

MERCHANTS—

The law taxing the capital of merchants is constitutional.

METHODIST CHURCH—

Trustees of the Methodist Episcopal Church can not create private interest in lands conveyed to them in trust, for the use of the church, according to its rules and discipline, unless such interest is consistent with the trust expressed in the deed, or with the rules and discipline of the church, 543.

MORTGAGE—

1. Assignment of a debt secured by mortgage, accompanied with a delivery of the mortgage deed, is valid transfer of the mortgage, 320.
2. Holder of a recorded mortgage does not act fraudulently if he prepare a second mortgage, and remain silent concerning his own, 320.
3. Bill by a purchaser of mortgaged premises from the mortgagor, against the mortgagee to redeem, charges that the mortgagee *fraudulently* looked on and saw the purchaser from the mortgagor make large improvements, and did not disclose his title. Such charge of fraud must be answered—the bill is not bad on demurrer, 385.
4. Where real estate has been sold upon a previous mortgage, under proceedings of *scire facias*, no person being defendant but the mortgagor, a subsequent mortgagor can not come in to redeem, 499.

MOTION—

If a party be in court, where a motion is made affecting his interests, he is concluded by the decision, unless he show good reason to the contrary, 66.

NEW TRIAL—

1. No ground for a new trial, that inadmissible evidence was rejected, but upon incorrect grounds, 39.
2. When motion for new trial is grounded on newly discovered evidence, that evidence must be disclosed, 44.
3. New trial not granted, because newly discovered evidence might induce a different verdict, but only where its legitimate effect would require a different verdict, 44.

NOTICE—

1. Where persons covenant as sureties that their principal shall sell and account for merchandise intrusted to him, within a term specified, it is not necessary to maintain an action that notice of the failure be given to the sureties, 105.
2. Where a patent from the United States for land, recites that the right is derived from an administrator, plea of innocent purchaser without notice can not be set up, 458.

NUISANCE—

1. Action lies for nuisance affecting the health of the plaintiff and his family, 377.
2. Justices of the peace can not proceed, by action on the case, for injury done by nuisance, 200.

Party—Replevin.

PARTY—

Party, in court when motion is made affecting his interests, is concluded, unless good reason is shown to the contrary, 66.

PATENT MEDICINES—

Patentee, under the laws of the United States, for manufacturing medicines, can not administer such medicines, without conforming to state laws, 307.

PLEADINGS—

Plea, justifying entering plaintiff's close and carrying away stone, because required to construct the National road, is bad, unless it set out properly all the facts that are requisite to bring the case within the act of Congress, 426.

PRACTICE—

1. Cause reserved on the circuit, for decision at bank. The material facts should be reduced to writing, approved by the court, and transmitted with the papers, 37.
2. Sheriff's return that he had sold lands on execution, subsequently set aside, on motion of his representatives, he being deceased, and a different return made. The purchaser, at a distant day, may, under proper circumstances, have the order rescinded, and the sale confirmed, 59, 60.
3. A *devastavit* by administrators can not be tried in a suit on the administration bond, against the administrator and his securities, 98.
4. On *sci. fa.* to subject debtor's lands to execution upon judgment rendered by justice of the peace, judgment awarding execution may be rendered at the return term, without rule for plea, 138.
5. Nothing examinable, on error in chancery, but the bill, answer, exhibits made part of them, the decree, and matter made part of the case by bill of exceptions, 231.
6. Plea, justifying entering plaintiff's close, and carrying away stone, under act of Congress, for constructing the National road, is bad, unless it sets out all the facts that bring the case within the act, 426.

PURCHASER—

1. Party purchasing land, the patent for which recites that the title is derived from an administrator, is bound to take notice that administrator had power to sell, 458.
2. Purchaser of mortgaged premises, sold under judgment on *scire facias*, holds the land purchased, discharged of subsequent incumbrances, 499.

REPLEVIN—

1. Administrator replevins goods as the property of his intestate, in the hands of a stranger. On the trial, property is proved in a third party, and the stranger obtains judgment, for the value, against the administrator, equity will hold the judgment for the benefit of the real owner of the goods, 76.
2. Party prosecuting a groundless action of replevin can not be relieved in equity against the consequences, 79.

 Roads—Towns.

ROADS—

It is competent to prove the establishment of a road, by original books of county commissioners, and by the original survey, 82.

SCIRE FACIAS—

1. On a *sci. fa.* to subject debtor's lands to execution, upon a judgment before a justice of the peace, constable's return of *nulla bona* is sufficient, though made before execution run out, 136.
2. It is not error in such case, to render judgment, at the return term of the *sci. fa.*, without rule to plead, or without plea, 136.

SET-OFF—

Where different rights are involved, judgments can not be set-off on motion, 91.

2. When credit has been obtained upon an agreement to pay and take up certain notes, as they become due, the notes are not taken up, and suit is brought upon the credit, the liability on the agreement can not be used as a set-off, 356.

SHERIFF—

1. Before the act of February, 1824, where a sheriff in office levied upon lands, a sale by the same individual, upon a *vendi.* issued to him, when out of office, was valid, 55.
2. Sale of land by former sheriff, deed must be made by sheriff in office, at the time of executing it, 62.
3. Appointment of a deputy sheriff valid, where the warrant of appointment is deposited with the clerk, although the fact of such deposit is not indorsed upon it, 89.
4. Distribution of fees, between old and new sheriff, made by court of common pleas, not to be reviewed by Supreme Court, except a case of gross abuse is presented, 423.

SPECIFIC PERFORMANCE—

An agreement to emancipate a slave, made in Kentucky, upon good consideration, may be specifically executed in equity, against the purchaser and subsequent purchasers with notice, 371.

STEAM DOCTORS—

A patent from the United States, for the manufacture of medicines, does not authorize the patentee to administer such medicines, without conforming to the state laws, 307.

TAX—

The law taxing the capital of merchants is constitutional, 107.

TENANTS—

Plaintiff in ejectment can not compel tenant in possession to make himself defendant, 442.

TOWNS—

Incorporated towns can not enforce ordinances against estrays, owned by non-residents of the corporation, if such ordinances are variant from the general law regulating taking up estrays, 431.

Trespass—Witness.

TRESPASS—

Trespass can not be maintained by the owner of land, held by a tenant in actual possession, paying part of the produce as rent, 434.

TRUST—

1. Where the grantee, in a deed of trust, agreed to accept the trust, before it was created, the recording such deed is an operative delivery, 74.
2. Trust, to hold real estate, dispose of it, and invest proceeds, under the direction of the grantor, for the issue of a contemplated marriage, inures for the benefit of such issue, though grantor died without directing the sale and investment, 75.
3. Trust of a term created in contemplation of marriage, does not destroy title by curtesy, 171.

USE AND OCCUPATION—

Action to recover mesne profits, after recovery in ejectment, as for use and occupation, can not be maintained, 213.

WITNESS—

A negro is not admissible, as a witness, in a prosecution against a quarteroon, 352.

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